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MICHAEL RODAK, J

IN THE

Supreme Court of the United States

TERM, 1974

No. 73-2014

MISSOURI PORTLAND CEMENT COMPANY,

Petitioner,

v.

CARGILL, INCORPORATED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

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MISSOURI PORTLAND CEMENT COMPANY,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review a judgment entered on June 10, 1974, by the United States Court of Appeals for the Second Circuit which judgment reversed an order of the United States District Court for the Southern District of New York preliminarily enjoining a tender offer by respondent Cargill, Incorporated ("Cargill") for all of the common stock of petitioner Missouri Portland Cement Company ("Missouri"). After a full evidentiary hearing and with extensive findings of fact the District Court had concluded that an injunction should issue because the acquisition would violate Clayton Act § 7. Acknowledging that there was "not much controversy over the basic facts" the Court of Appeals reversed concluding that no such violation was probable.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, filed June 10, 1974, as yet unreported, is set forth in Appendix A hereto. The opinion of the United States District Court for the Southern District of New York, as yet unreported, is set forth in Appendix B hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on June 10, 1974, and a further order denying rehearing was entered on June 24, 1974. This Court has jurisdiction pursuant to 28 U.S.C. Section 1254(1).

Statute Involved

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. § 18.

Questions Presented

1. Is the potential competition doctrine developed by this Court inapplicable to pure conglomerate mergers: those in which the products of the acquired and acquiring companies are not closely related?

2. Is a court precluded from finding a probable violation of Clayton Act Section 7 because there is no proof as to exactly how the "deep pocket" of the acquiring company may increase the acquired company's already dominant market share?

3. Does an acquisition violate Clayton Act § 7 if the acquiring company could enter *de novo* or by toehold acquisition into the highly concentrated markets dominated by the acquired company?

4. Should the standard applied in determining preliminary relief under the Clayton Act vary with the character of the private antitrust plaintiff so as to discourage particular private antitrust actions?

Statement of Facts

The Parties

A. Petitioner's Line of Commerce

Petitioner Missouri Portland Cement Company is a publicly-owned corporation engaged in the manufacture and sale of portland cement, a fungible gray powder used as a binding agent in the preparation of concrete and sold principally to ready-mix concrete dealers.

Petitioner manufactures portland cement at three riverfront plants, from which the cement powder is shipped in bulk form by either river barge or by railroad car to storage terminals located in various metropolitan centers or by truck to customers in the immediate vicinity of the plants.

The cement shipped to the storage terminals is in turn usually delivered from the storage terminals to customers by truck. The need for delivery by truck and the essentially local nature of the concrete business limits the area of effective competition in cement sales to metropolitan centers, which have traditionally taken on the characteristics of discrete markets.

The court below accepted that Petitioner is a dominant competitor in four highly concentrated regional markets: the metropolitan areas of St. Louis, in which Petitioner has the largest market share, 28%; Kansas City, in which Petitioner has the largest market share, 30%; Memphis, in which Petitioner has the largest market share, 30%; and Omaha, in which Petitioner has the second largest market share, 21%.

In Omaha, the two largest producers of portland cement control 83% of the market, and the four largest control 98%; in Memphis, the three largest producers control 78%, and the four largest control 88%; in Kansas City, the three largest producers control 77%, and the four largest control 89%; in St. Louis, the four largest producers control 90% of the market. These relevant markets are more highly concentrated than the relevant geographic market for beer involved in *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 527 (1973) (four largest producers controlled 61% of the market) and the relevant geographic market for bleach involved in *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568, 571 (1967) (six largest producers controlled 80% of the market). It is established that there are no significant technological or regulatory barriers to entry into these markets. There have been several instances of *de novo*

and toehold entry into these and other metropolitan cement markets in the past. In each such instance entry has been by a substantial company possessing the cash resources needed to make such entry possible.

B. Respondent's Lines of Commerce

Respondent Cargill, Incorporated is a huge, privately-held company engaged in various bulk commodity businesses. Respondent's sales for 1972 totaled $5.2 billion, and a considerable increase in sales is expected for the 1973 fiscal year. Respondent would rank as approximately the twelfth largest domestic corporation in terms of sales for 1973; Respondent is five times larger, in terms of total sales, than Procter & Gamble at the time of the decision of this Court in *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568 (1967). Respondent's businesses have proved highly lucrative. One of these businesses—wheat sales—has been so spectacular during the last two years that Respondent has an abundance of cash; in fact, Respondent planned to acquire the common stock of Petitioner for $45 million of ready cash.

Respondent began as a grain trading company in the late nineteenth century. Beginning in 1960 Respondent accelerated its efforts to diversify and has entered numerous bulk commodities businesses such as sugar trading, flour milling, industrial salt, corn wet milling, ores and metals, bulk ocean shipping, vegetable oil processing, animal feeds, poultry products, fertilizers, artificial resins, and polyurethanes.

The similarities between these various bulk commodities may not be readily apparent, but the skills acquired in one bulk commodity business are in fact readily transferable to

another. Respondent's chairman testified that Respondent would not have entered any of these businesses except for the fact that each bore a relationship, in terms of skills and transportation advantages, to its other commodities businesses. The District Court specifically found that Respondent had developed considerable skills in production, marketing and distribution that were applicable to a wide range of bulk commodities businesses.

> "Cargill has developed considerable expertise in the production, marketing and distribution of bulk commodities. The commodities business requires skill in negotiation of price with sophisticated industrial users, an ability to control and limit excessive transportation costs and an ability to provide service that is expected by usual industrial customers. These skills are substantially transferable from one commodity to another. In this area Cargill has salesmen who know how to sell fungible products and have been transferred by Cargill from the sale of one bulk commodity to another. Cargill has also developed the ability to transport heavy bulk products profitably, promptly and reliably. Because Cargill is a large shipper it is given preferential treatment by railroads and other shippers. Railroads and other shippers respond quickly to service requests by Cargill. Being an immense company with prompt access to transportation services of its own as well as of others places Cargill in an ideal position to exploit these abilities by expanding its business into different bulk products." (App. B at 59a)

Until now, Respondent has invariably entered other bulk commodity businesses by *de novo* or "toe-hold" entry. Respondent has spent millions of dollars in these diversification efforts, and has, by its own testimony, always pursued

a policy of becoming a significant factor in each business it enters.

To enter the rock salt business, Respondent leased rights to a salt dome, commissioned the construction of a new mine, and hired experts in rock salt from other businesses to organize the new company. To enter ocean shipping, Respondent purchased a fleet of new bulk cargo carrying vessels for $55 million and hired ocean shipping personnel. Respondent entered sugar trading by hiring an experienced sugar trader who trained Respondent's bulk commodities salesmen to trade sugar; it entered ore trading by acquiring a medium-sized regional trading operation; it entered flour milling and corn wet milling by acquiring small companies with single plant facilities; and it entered poultry processing by acquiring three small plants, one for processing turkeys, one for processing chickens, and one for breeding chickens. Once Cargill entered these businesses, it expanded significantly by adding production lines and expanding the flour, corn wet milling, and poultry processing plants of its entry vehicles and by constructing an additional corn wet milling plant, and by developing new salt and ore mines.

C. Cargill's Decision to Enter the Cement Business

Personnel in Respondent's Salt Department were the first to become interested in entering the portland cement business. The initial report of that department in 1972 cited the similarities between the skills employed in the production and sale of industrial salt and portland cement.

Following this initial report, Cargill conducted, for more than a year, an extensive study of the cement industry, supervised directly by and with the continuing involve-

ment of its Executive Vice President. In late September 1973 the Salt Department summarized for the Long Range Planning Committee of the Board of Directors certain of the reasons why entry into the cement industry would be attractive for Cargill. No mention was made that entry be conditioned on acquiring any particular cement company. That report* stressed the significant similarities in distribution, marketing and production between salt and cement, and pointed out that:

> "Cement is a basic bulk commodity which would enable Cargill to utilize its transportation expertise, both in relation to land and water."
>
> "Cement is an international commodity which would fit into Cargill's international operations readily."

The District Court concluded that for such reasons entry by Cargill into Cement was "very logical", (App. B at 61a).

The initial recommendation of Respondent's employees, including Cargill's Executive Vice President who had studied the attractiveness of entry into the cement business, was that Cargill purchase a cement facility with a production capacity of 1½ to 3 million barrels a year. Petitioner's capacity is five to seven times greater. According to the internal Cargill Report acquisition of a plant of the recommended small size would afford Cargill the opportunity to learn more about the industry and at the same time earn a pre-tax return of 12 to 20% for the first year or two, and thereafter an expected 20 to 25% pre-tax return on investment. Those persons who prepared this recommendation were identified by Cargill's Chairman as

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* Significant passages from this Cargill report are quoted at length in footnote 2 of the District Court's opinion (See App. B at 62a).

being in the best position at Cargill to judge the efficient size of an entry vehicle and the projected profits for such a small entry vehicle gave Respondent a significant incentive for entry. A study prepared by Cargill's cement expert (formerly president of the Marquette Cement Company), listed numerous companies as prospective toe-hold entrants and classified several as excellent prospects.

The internal recommendation to acquire a "toe-hold" company, was subsequently rejected because Cargill's Finance Department decided that the cement industry was so lucrative that Cargill should invest as much as possible in the industry and not confine the proposed investment to a mere $10 million. In addition to the view of Respondent's Finance Department, Cargill's investment bankers cited the highly favorable prospects for the cement industry over the next several years.

Before tendering for Missouri, Cargill contacted 31 of the 51 cement companies in the United States, in each case suggesting a possible acquisition. Followup executive meetings were held with at least ten companies, including some with significantly smaller market shares than Petitioner. Even after Cargill had received an initial negative response to its acquisition inquiry from Petitioner, Cargill conducted additional discussions with several other cement companies, once more including companies with market shares smaller than Missouri. Respondent's President contacted one smaller company, reporting that it was "great" except as to the initial asking price. Just a few days before the instant tender offer was arranged, Cargill's Executive Vice President requested a right of first refusal on a cement company considerably smaller than Petitioner.

As a result of such inquiries and discussions, it is undisputed that Cargill is widely perceived in the relevant market as a potential entrant. Indeed prior to the tender offer there was a general discussion of Respondent's interest in entry at a cement industry trade association meeting. Personnel of one cement company even went so far as to mention to Cargill their concern that Respondent would enter the industry and have a substantial competitive impact on the market; that its competitive impact would be like a "bull in a china shop".

D. The Tender Offer

As a result of the views of Respondent's investment banker and its Financial Department that the cement industry was attractive for entry and that Petitioner was an attractive company with its stock price depressed, Respondent decided to tender for all of the outstanding shares of the common stock of Petitioner. The tender offer was announced on December 19, 1973. The offer was to continue until January 4, 1974, the offering price of $30 per share representing a premium of $5.75 over the New York Stock Exchange price for Petitioner's stock on December 18. If fully subscribed, the offer would require a total payment of approximately $45,000,000 in cash. By the time the District Court preliminarily enjoined the tender offer on January 7, 1974, Cargill had acquired approximately 18% of the outstanding shares of Petitioner.

Having selected Missouri as the vehicle by which it would enter the cement industry, Cargill has unequivocally stated that it intends to use its cash resources to increase Missouri's size and market share. The Chairman of Respondent testified explicitly that Cargill plans to increase

Missouri "substantially". Respondent's files also contain documents reflecting Cargill's intention to increase the size of its initial entry vehicle, irrespective of the method of entry chosen. Respondent has also expressed the view that it will be able to obtain transportation preferences for cement, due to its volume shipping of various commodities, thereby placing Missouri in a competitively advantageous position. In addition there was testimony that increasing cement facilities in today's cement market brings an automatic increase in market share because the market is in a state of short supply. It was the District Court's finding—not challenged by the Circuit Court—that Missouri is already dominant in the four relevant markets. (See App. B at 56a, 72a).

The Instant Action

Petitioner opposed the tender from the outset because it considered the tender price to be substantially inadequate.* It is settled that Missouri has standing to bring such an action on behalf of its shareholders. See, e.g., *Perma Life Mufflers, Inc.* v. *Int'l Parts Corp.*, 392 U.S. 134 (1968).

In its complaint Missouri alleged that its acquisition by Cargill would violate Section 7 by substantially lessening

* That the $30 price is too low is clear from Cargill's own documents and from those of First Boston Corporation, Cargill's investment banker. The replacement cost of Petitioner's tangible assets alone is $200 million; in addition, Petitioner's intangible assets, including good will and established market positions in seven metropolitan areas, are valuable. In addition, future prospects for the industry are bright, as Cargill's studies confirm, because supply is short and because Cost of Living Council price restrictions have been removed. Cargill's documents indicate its belief that Petitioner can be acquired now due to the psychological state of the stockholders in a depressed market.

competition in the following ways: (a) *Entry Effect:* Cargill would be eliminated as a potential *de novo* or "toe-hold" entrant into the highly concentrated cement markets served by Missouri; (b) *Wings or Edge Effect:* Competition would be diminished as a result of the elimination of Cargill as a widely perceived potential competitor on the edge of the market whose presence would otherwise have a likely disciplining influence on existing competition; (c) *Entrenchment; Deep Pocket:* Competition would be diminished as a result of Cargill's entrenchment of the already dominant position of Petitioner in four highly concentrated regional markets in that barriers to entry would be raised and intra-industry competition would be deterred.

The District Court Decision

On January 7, 1974 the District Court issued an order preliminarily enjoining Cargill from proceeding with the tender offer. On April 15, 1974 the District Court filed its opinion sustaining Missouri's position as to the likely anti-competitive effects of the acquisition in all respects. The Court concluded that Cargill was—by its own testimony—in a related line of commerce and was "the most likely entrant" into the relevant cement markets at this point in time, (App. B at 66a). "[B]ased upon the evidence . . . the cement industry [is] perfect for Cargill's diversification plans." (*Ibid.*)

The Court found that the effect of the acquisition of Missouri by Cargill would be to substantially lessen potential and actual competition in the relevant regional markets in three distinct ways: (a) *Entry Effect:* It would eliminate Cargill as a prime potential *de novo* or toehold entrant into the highly concentrated regional cement markets dominated

by Missouri and the loss of Cargill as a potential entrant "is likely to cause a substantial anti-competitive effect" (App. B at 73a; see id. at 75a); (b) *Wings or Edge Effect:* Because Cargill may be perceived as a substantial competitor on the edge of the highly concentrated regional markets having a "disciplining influence" on competitive forces in those markets, the loss of Cargill as a potential competitor "raises a serious possibility of a second anti-competitive effect" (App. B at 75a); and (c) *Entrenchment; Deep Pocket:* Cargill is a "huge" corporation (with $5.2 billion in sales) with access to significant transportation advantages ("preferential treatment by railroads and other shippers"), and "grafting" its "huge financial resources and competitive advantages" onto Missouri ($45 million in sales), "already dominant in concentrated submarkets, will raise significant barriers to entry into those markets and will increase the dominance of Missouri". (App. B at 77a).

In granting an injunction, the District Court followed the Second Circuit's previous decision in *Gulf & Western Indus., Inc.* v. *Great A & P Tea Co.*, 476 F.2d 687 (2d Cir. 1973), and found that permitting the tender offer to go forward would subject Missouri to "serious and irreparable harm caused by the disruptive effect on Company morale, the difficulties of unscrambling merged assets and the adverse effect of being involved in an antitrust violation", (App. B at 79a), and that the balance of equities tipped decidedly in favor of Missouri. The District Judge emphasized additionally that the public interest "clearly favors enjoining an acquisition which may substantially lessen competition", (App. B at 79a), and the loss to Cargill will only be the expense entailed in possibly having to start up a new tender offer at a later date, (App. B at 66a).

The Court of Appeals Decision

The Court of Appeals reversed the grant of the preliminary injunction, concluding that the tender offer could go forward, but directing the District Court to fashion an order permitting the lawsuit to proceed at the same time. The Court of Appeals gave no direction as to how an order was to be framed so that Petitioner, prospectively Respondent's own subsidiary, could proceed to trial against Respondent.

The Court of Appeals minimized, if not ignored, the finding of the District Court that the cement business is related to Respondent's other bulk commodity businesses and found that the absence of a close product relationship set this case apart from prior decisions involving potential competition and possible entrenchment. It also criticized target companies for interfering with the capital markets by seeking to enjoin tender offers on antitrust grounds. With repeated reference to these two seminal points, the Court concluded as follows on each of the issues presented by Petitioner: *Entry Effect:* on the basis of the testimony of Respondent's Chairman during the litigation to the effect that he had not given any serious attention to the acquisition of a less dominant company, *and on the basis of the high costs of construction,* Respondent "has no interest in entering Missouri's markets unless it can obtain a significant market share"; *Edge Effect:* although it was well-known in the market place as being interested in entry, there was a lack of direct evidence "that Cargill exerted any 'edge effect' on present competitive conditions", (App. A at 29a), and prior decisions of this Court dealing with edge effect were dis-

tinguishable in that the products in those cases were more closely related so that the acquiring company had a greater commitment to the products of the target company, and thus would be more likely to stay on the edge of the target company's market if the challenged acquisition were not consummated; *Entrenchment; Deep Pocket:* Respondent's very deep pocket was irrelevant because there was a lack of evidence as to *exactly how* Respondent ("a huge company") would entrench Petitioner, already dominant in four markets, (App. A at 27a-29a).

Reasons for Granting A Writ of Certiorari

A writ of certiorari should issue to review the judgment of the Court of Appeals because that Court has rendered decisions on two important issues concerning the application of Section 7 of the Clayton Act to conglomerate mergers in conflict with decisions of Courts of Appeals for other Circuits on those same questions; because the Court of Appeals has decided an important issue of federal antitrust law which has not been, but should be, decided by this Court; and because the Court of Appeals has rendered a decision in conflict with several prior announcements of this Court concerning the applicability of Section 7 and the benefits of private antitrust litigation. This Court should review the judgment at this time because the conflicts among the courts of appeals will persist regardless of the outcome of the proceedings on remand, *see, e.g., American Construction Co.* v. *Jacksonville, T. & K.W. Ry.*, 148 U.S. 372, 383 (1893) (review of interlocutory judgment of Circuit Court of Appeals appropriate "to secure uniformity of decision"); *Forsyth* v. *Hammond*, 166 U.S. 506, 514 (1897) (review of interlocu-

tory judgment appropriate in view of "the necessity of avoiding conflict between two or more Courts of Appeals"); *Hanover Star Milling Co.* v. *Metcalf*, 240 U.S. 403, 408 (1916) (same), and because of the fundamental importance of the issues raised herein to enforcement of the antitrust laws in general and to the further conduct of these proceedings in particular. *See, e.g., Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 153-54 (1964); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947); *United States* v. *General Motors Corp.*, 323 U.S. 365, 377 (1945). Unless this Court now reviews these well-defined legal issues Respondent will be permitted to acquire complete or substantial control of Petitioner with the result that the decision of the Court below will probably stand as the law and this Court may well be denied the opportunity of resolving acknowledged conflicts among the circuits and overturning the decision of the Court of Appeals to the extent that it conflicts with prior holdings of this Court.

I. The Court of Appeals Effectively Held that the Doctrine of Potential Competition Is Inapplicable When the Products of the Acquired and the Acquiring Companies Are Not the Same or "Closely Related", in Conflict with a Decision of the Court of Appeals for the Tenth Circuit

The first significant conflict between circuits arises from the heavy emphasis in the Court of Appeals opinion on the limited relationship between the products of Petitioner and Respondent. The Court repeats time and again its point that the relationship is only as to skills, and is not of the same type as in prior Supreme Court decisions. The Court opens its opinion by stating "that we are not here dealing with the types of merger that have been the historic con-

cerns of the antitrust laws" (App. A at 12a), as the acquisition of Petitioner by Respondent was not horizontal or vertical in nature, and as it was not "even" a "product extension merger" since the two companies did not produce "related products". (See App. A at 13a). Then the Court of Appeals expressly distinguishes the prior decisions of this Court dealing with potential competition because they involved either related product lines or horizontal or vertical restraints, effectively concluding that the doctrine of potential competition is inapplicable unless the lines of commerce of the acquired and the acquiring companies are at least "closely related".* In judging whether Respondent is a potential entrant, the Court stresses the purportedly unrelated product lines as a crucial evidentiary factor**

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* *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964) was characterized as of "little guidance because the anticompetitive effect of El Paso's acquisition of its sole prospective competitor was so obvious that the Court was not pressed to explore the limits of the potential competition doctrine." *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964), was not controlling, the court below wrote, because due to the more remote relationship of its products "Cargill has no permanent commitment to the cement industry of the sort that both Pennsalt and Olin had to chemicals such as sodium chlorate" and because of the "strong overtones of both horizontal and vertical combination" not present in this case. *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568 (1967), was held to be "distinguishable on a number of grounds", including the "close similarity in products, customers, [and] marketing techniques" and post-acquisition behavior by Clorox. *Ford Motor Co.* v. *United States*, 405 U.S. 562 (1972), had, the court below wrote, "little or no bearing here" because of vertical aspects of the case and because Ford was "clearly a potential *de novo* entrant into the industry". Finally, the Court of Appeals said of this Court's decision in *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526 (1973), that "the only addition it makes to Procter & Gamble is that in *Falstaff* the 'edge of the market' factor stood more clearly alone." The Court also distinguished *Falstaff* because it involved a beer company entering another beer market.

** None of the factual findings of the District Court was held to be "clearly erroneous". The Court of Appeals independently arrived at the legal conclusion that Respondent was not a potential competi-

and then as to edge effect the Court of Appeals holds that the District Court's error lay in equating this case with those where the products were closely related, (App. A at 23a).

Because of the Court's constant reference to the lack of close relationship between products as crucial on virtually every issue presented, the unmistakable effect of its holding is that the doctrine of potential competition does not apply to pure conglomerate mergers. The Second Circuit obviously seeks to circumscribe the potential competition and entrenchment doctrines of this Court (as to which it indicates an evident though respectful distaste throughout its opinion) and that is the unquestioned effect of its opinion; for to restrict the application of Section 7 to all of the hundreds of conglomerate mergers which take place each year is to erect a barrier to antitrust enforcement of dramatic significance.

Such a view conflicts sharply with the recent decision of the Court of Appeals for the Tenth Circuit in *Kennecott Copper Corp.* v. *FTC*, 467 F.2d 67 (1972), *cert. denied*, —— U.S. ——, 42 U.S.L.W. 3555 (April 1, 1974) and with utmost candor the Second Circuit has acknowledged the conflict.

In *Kennecott*, the largest copper producer, Kennecott, acquired through a subsidiary, the largest coal company, Peabody. As in the instant case, the acquiring company was "cash rich". As in the instant case, the acquiring company

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tor. The "clearly erroneous" standard of review of factual findings does not, of course, apply with respect to legal conclusions of a lower court that activities or status are not proscribed by the antitrust laws. *See e.g., United States* v. *General Motors Corp.*, 384 U.S. 127, 141 n.16 (1966).

had concluded that diversification into new industries was desirable. As in the instant case, the acquiring company had conducted a study of the new industry and its decision to enter was "undoubtedly influenced by the fact" that the acquiring company employed skills which were similar to those utilized in the acquired company's line of commerce. 467 F.2d at 77. Concluding that on such facts Kennecott was a potential competitor in the coal industry, the Court held that the acquisition violated Section 7. The Tenth Circuit specifically noted that the acquisition was not horizontal, vertical, or "product extension" in nature, but conglomerate and that "[s]ince this was a conglomerate merger there existed little direct economic relationship between the two firms . . ." 467 F.2d at 75. But it nevertheless found that the doctrine of potential competition applied to such mergers or acquisitions where the products were not closely related. *Id.* at 75-79. Thus, the Tenth Circuit followed the pronouncement embodied in the opinion of this Court in *Procter & Gamble:* that "[a]ll mergers are within the reach of § 7, and all must be tested by the same standard, whether they are classified as horizontal, vertical, conglomerate or other", 386 U.S. at 577. It did not limit the potential competition doctrine to cases in which the products of the two companies were "closely related", as did the Second Circuit in its opinion below.

Petitioner relied upon *Kennecott* in the court below and that court acknowledged that it was not following the *Kennecott* decision:

> "MP also relies heavily on *Kennecott Copper Corp.* v. *FTC*, 467 F.2d 67 (10 Cir. 1972), *cert. denied* — U.S. —, 42 U.S.L.W. 3555 (Apr. 1, 1974), the facts

> of which are closer to those here presented than any of the Supreme Court cases. However, that decision has been cogently criticized, 86 Harv. L. Rev. 772 (1973), and while we surely would not be prepared to say without further study of the facts that we disagree with it, *we are equally unprepared to accept it as correctly interpreting §7*". (App. A at 17a) (Emphasis supplied).

Such an acknowledged conflict between the Courts of Appeals for the Tenth and Second Circuits should be authoritatively resolved by this Court. Indeed even absent a conflict this Court should state its posititon on such an important issue. The logical thrust of the potential competition doctrine has been the preservation of potential for entry (entry effect) or perceived potential for entry (wings or edge effect) and an acquisition frustrating such potential entry should be proscribed, without imposing an unbending requirement that the products be related. To do otherwise is to elevate an evidentiary factor—the relationship of products—which can no doubt make proof of potential for entry easier, into a rigid requirement which could greatly restrict the application of the potential competition doctrine in appropriate cases. The potential competition rationale is by no means invariably applicable to all conglomerate mergers; but neither was the Second Circuit correct in suggesting that it is inapplicable in the case of an acquisition where the products are not closely related.

II. The Court of Appeals Held that the Doctrine of Potential Competition Requires a Private Antitrust Litigant to Demonstrate Exactly How the "Deep Pocket" of the Acquiring Firm will Probably Lessen Competition, in Conflict with Decisions of the Courts of Appeals for the Third, Sixth, Seventh, and Tenth Circuits.

In *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568, 578 (1967), this Court held that a merger which substitutes "the powerful acquiring firm for the smaller, but already dominant, firm may substantially reduce the competitive structure of the industry by raising entry barriers and by dissuading the smaller firms from aggressively competing," in violation of Section 7. *See also United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 531 (1973). The resources or "deep pocket" of a large acquiring company may be used to entrench the market position of the acquired company, thereby inhibiting future competition within the market and raising financial, psychological, and other barriers to entry, resulting in the heightened probability of oligopolistic market behavior.

The Court of Appeals herein accepted the findings of the District Court that Respondent was a "huge" corporation with tremendous financial resources; that the cement industry was capital intensive and therefore that existing barriers to entry were high; that Respondent intends to use readily available cash resources to increase substantially Petitioner's capacity; and that Respondent intends to use its established position as a bulk commodity shipper to obtain transportation preferences, and therefore competitive advantages, for Petitioner.

The Court of Appeals, however, concluded that Petitioner had not proved the probability of a substantial lessening of

competition in the cement industry. The Court held that "the 'entrenchment' theory seems to require more than simply a showing that the acquiring firm has a deep pocket", (App. A at 28a). In other words, a private antitrust litigant must demonstrate more than that the acquiring company has the financial resources and actual intent to increase the market share of the dominant acquired company in a highly concentrated market. This holding, that an antitrust plaintiff must show *exactly* how entrenchment will result, not only appears at odds with *FTC* v. *Procter & Gamble*, 386 U.S. 568 (1967), but also clearly conflicts with decisions of Courts of Appeals for four circuits. Those decisions do not require that a plaintiff specifically forecast, and then prove, how the "deep pocket" of the acquiring company will be utilized. Instead they hold that a Section 7 violation can be found when the probability of entrenchment appears from the character of the acquiring company or market conduct and the Second Circuit expressly recognized in its opinion below that these other Courts of Appeals "have been quite generous in accepting [Federal Trade] Commission findings that in particular circumstances the purchaser's 'deep pocket' has had an anti-competitive effect", (App. A at 28a, n.32).

In *Kennecott Copper Corp.* v. *FTC*, 467 F.2d 67, 78 (10th Cir. 1972), *cert. denied*, — U.S. —, 42 U.S.L.W. 3555 (April 1, 1974), the Tenth Circuit held that, under the "deep pocket" theory "it was reasonable for the Commission to conclude that Kennecott would use its immense financial resources to gain for Peabody, already the number one producer in the industry, an even larger share", in violation of Section 7. The fact of the deep pocket joined with the evident profit maximization incentive for Peabody to

use the added resources of Kennecott were together sufficient to reach the conclusion. In *United States Steel Corp.* v. *FTC*, 426 F.2d 592, 603-4 (6th Cir. 1970) the Sixth Circuit held that "the sheer size and financial resources of U.S. Steel visit non-competitive stabilizing forces on the competitors of [a subsidiary and the acquired company]. U.S. Steel has the capacity to extend its credit and resources to aid . . . in gaining a particular job. It has extensive financial and personal contacts throughout the building industry." In *General Foods Corp.* v. *FTC*, 386 F.2d 936, 946 (3rd Cir. 1967), *cert. denied*, 391 U.S. 919 (1968) the Third Circuit held that "the [Federal Trade] Commission could reasonably conclude that the potential competition was adversely affected by G.F.'s entrance into the market through the acquisition of S.O.S. because the entry of such a large, well-financed, aggressive competitor" would raise barriers to entry and tend to make the market more oligopolistic due in part to "the power to take retaliatory action against any aggressive competition by smaller competitors". And in *Ekco Products Co.* v. *FTC*, 347 F.2d 745, 752 (7th Cir. 1965) the Seventh Circuit held that the use by the acquired company of the financial resources of the acquiring company "may serve to entrench and preserve [the acquired company's] monopoly" in violation of Section 7.

In each of these cases the Court held that a Section 7 violation was established by proof of the financial ability of the acquiring company and the general probability of entrenchment of the market position of the acquired company. By contrast Petitioner's proof of Respondent's ability *and actual intent* was stronger than that adduced in any of the above decisions, with the possible exception of *Ekco*

Products. Here, Respondent's chairman has unequivocally testified that Respondent intends and expects to use its resources to increase Petitioner's size "substantially".

Again the conflict between circuits necessitates resolution by this Court. And, too, even if there were no conflict review would be essential; for if the concepts of raising barriers to entry and discouraging intra-market competition through acquisition of a dominant firm and the theories of entrenchment generally (see *FTC* v. *Procter & Gamble*) are to have continuing meaning, the Second Circuit opinion should not be allowed to stand.

III. The Court of Appeals Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Decided by This Court.

The District Court made findings amply justifying the conclusion that Respondent probably would and surely could have entered the market by *de novo* or "toe-hold" acquisition. In fact Respondent itself never took the position that it would or could not enter in such manner. It listed *de novo* entry as a low priority option, plainly preferring an acquisition to such independent entry but it never ruled out *de novo* entry if other options were not open. As to toe-hold entry, the history of Respondent's repeated successful diversification into related bulk commodity businesses, always by either *de novo* or toe-hold acquisition, demonstrates its realization that such entry is both feasible and financially attractive. In several instances Respondent spent more to enter and grow in such other industries than it plans to spend to acquire Petitioner and there is no doubt that Respondent has the financial resources for *de novo* entry or a toe-hold acquisition

in cement. In fact those employed by Respondent responsible for the evaluation of the possibility of entering the cement industry suggested the acquisition of a company of considerably less capacity, and smaller market share, than Petitioner. And Cargill's cement expert singled out various smaller firms as excellent prospects. Respondent "seriously considered" acquiring at least five companies, four of which were smaller than Petitioner. And there are no technological or regulatory barriers to independent entry as in the recent decision of the Court in *United States v. Marine Bancorporation*, No. 73-38, Slip Opinion p. 20 (United States Supreme Court, June 26, 1974).

Contrary to this evidence as to *de novo* entry the Court of Appeals concluded that high *cost* precluded entry in that it would not be profit maximizing to pay higher new construction costs rather than purchase an existing dominant competitor. As to toe-hold entry the Court of Appeals found that there was insufficient evidence that toe-hold prospects were available in the relevant geographical markets. "The plants cited as available means of entry into the defined markets are either already dominant in some other market, or owned by enormous national or international cement companies, or *poor prospects for the future*", (App. A at 25a) (Emphasis supplied). It also found the toe-hold theory "difficult to understand", (App. A at 25a), because it would require either future high cost new construction or additional small acquisitions if the acquiring company were to grow to significant size. In thus fastening its analysis of potential for entry so much to cost and to the fact that toe-hold candidates were "poor prospects for the future", the Circuit Court found that the judgment as to

whether a company can or probably will enter a business must be made on the basis of what the acquiring company considers to be a comparably "attractive" acquisition, (App. A at 25a). Such business barriers as cost are, of course, not at all like the insuperable regulatory barriers found in the recent decision of the Court in *United States* v. *Marine Bancorporation.* And, in putting aside the evidence that Cargill is a potential entrant and in relying upon such factors as cost of entry as insuperable deterrents, the Court of Appeals has ignored the fact that "[u]nequivocal proof that an acquiring firm actually would have entered *de novo* but for a merger is rarely available." *United States* v. *Marine Bancorporation, Inc.*, No. 73-38, Slip Opinion p. 20 (United States Supreme Court, June 26, 1974). And in so doing, it has placed itself in direct conflict with this Court's prior decisions in *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526 (1973); *Ford Motor Co.* v. *United States*, 405 U.S. 562, 566 (1972); and *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568, 585 (1972), where such considerations as the cost of independent entry were not regarded as dispositive on the potential entry issue even where the defendants said they definitely would not enter by any other route. *E.g., United States* v. *Falstaff*, 410 U.S. at 533.

But for purposes of this petition we do not ask that the Court balance the evidence on probability for entry, it being sufficient to note that the point is substantially debatable and that the District Court expressly found Cargill to be the most likely entrant based on the evidence as to Cargill's interest in cement generally, rather than on interest in a particular company. The point to be made here is that if the Court of Appeals was correct in concluding that

Respondent is not a probable entrant, there is unquestionably nothing to say that it *could* not enter, and that raises the question left open in this Court's prior decisions as to the effect of a finding that the acquiring company could enter the relevant markets independently rather than acquiring the dominant competitor. For purposes of resolving that question, all facts appear to be in order. *De novo* entry is evidently possible, having been accomplished by other firms in the past and there is no doubt that cash rich Cargill could purchase one of the "poor" toe-hold prospects the Court of Appeals mentioned. Cost alone is not an insuperable barrier and it is Cargill's expressed intention to be a significant competitor if it enters. See *Marine Bancorporation, supra.* The Court of Appeals has acknowledged Cargill's potential for becoming a significant competitive factor although it seems to prefer that Cargill become such a factor by linking itself to a dominant company. An existing competitor in the market has said that Cargill would be like a "*bull* in a shop if it were to enter".

In *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 537 (1973), this Court left

> "for another day the question of the applicability of § 7 to a merger that will leave competition in the market place exactly as it was, neither hurt nor helped, and that is challengeable under § 7 only on the grounds that the company could, but did not, enter *de novo* or through 'toe-hold' acquisition and that there is less competition than there would have been had entry been in such a manner."

This Court again reserved this specific question in *United States* v. *Marine Bancorporation, Inc.*, No. 73-38, Slip

Opinion p. 21 (United States Supreme Court, June 26, 1974), observing:

> "The Court has not previously resolved whether the potential competition doctrine proscribes a market extension merger solely on the ground that such a merger eliminates the prospect for long-term deconcentration of a ologopolistic market that in theory might result if the acquiring firm were forbidden to enter except through a *de novo* undertaking or through the acquisition of a small existing entrant (a so-called foothold or toehold acquisition). *Falstaff* expressly reserved this issue." (Footnote omitted.)

Although this issue as to the reach of Section 7 remains unresolved by this Court, a majority of the Justices of this Court participating in the decision in *Falstaff* indicated that Section 7 may proscribe such mergers.

> "There are traces of this view in our cases, see *Ford Motor Co.* v. *United States*, 405 U.S. 562, 567 (1972); *id.*, at 587 (BURGER, C.J., concurring in part and dissenting in part); *FTC* v. *Procter & Gamble Co.*, 386 U.S., at 580; id., at 586 (Harlan, J., concurring); *United States* v. *Penn-Olin Chemical Co.*, 378 U.S., at 173, but the Court has not squarely faced the question, if for no other reason than because there has been no necessity to consider it. See *Ford Motor Co.* v. *United States, supra; FTC* v. *Procter & Gamble Co., supra; United States* v. *Penn-Olin Chemical Co., supra; United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964)." 410 U.S. at 537-38 (footnote omitted). *See also id.* at 544 (Douglas, *J.*, concurring in part).

If the Court of Appeals is correct in its other assessments, this issue is now squarely presented. The fact that this

Court has twice seen fit to give specific mention to, but to reserve decision on, this question serves to demonstrate its significance. The importance and novelty of this question as to the scope of Section 7 justifies, if not compels, authoritative disposition by this Court.

IV. The Decision of the Court of Appeals Conflicts With Prior Pronouncements of this Court Concerning the Importance of Private Enforcement of the Antitrust Laws Regardless of the Character of the Individual Plaintiff.

The Court of Appeals, from the outset of its opinion, expressed open repugnance toward private target company litigants, such as Petitioner, who attempt to enforce the congressional mandate of Section 7 by seeking to enjoin, *in their incipiency*, anticompetitive mergers. The Court then established a special and more demanding standard for granting preliminary relief for target companies. Such an approach effectively judges the merits of an antitrust claim and the need for an injunction in terms of the character of the plaintiff rather than the public interest in preserving competitive markets.

The Court of Appeals commenced its opinion by stating:

> "This appeal illustrates the growing practice of companies that have become the target of tender offers to seek shelter under § 7 of the Clayton Act. . . . [T]he target company typically hopes to obtain a temporary injunction which may frustrate the acquisition since the offering company may well decline the expensive gambit of a trial or, if it persists, the long lapse of time could so change conditions that the offer will fail even if, after a full trial and appeal, it should be determined that no antitrust violation has been shown." (App. A at 2a).

At several other points in the opinion the Court of Appeals explicitly impugned the motives and character of target company plaintiffs such as Petitioner, mentioning that "[t]he argument about disruption of the morale of personnel . . . has become standard in take-over cases", (App. A at 36a), and that Petitioner had "the strongest motivation for foot-dragging", (App. A at 38a), as evidenced by its desire to obtain discovery of documents and witnesses prior to a plenary trial. The court concluded that the framers of the Celler-Kefauver amendment did not intend "to endow incumbent management of a target company with the power to block free trade on its securities unless the antitrust violation was fairly clear or the potential damage to the corporation decisively outweighed that to the would-be acquirer", (App. A at 40a) (Footnote omitted).

The Court of Appeals expressly held that since target companies "typically" desire to obtain preliminary relief which *might* be an occasion for reassessment of the tender offer, a special standard must be applied in determining the propriety of preliminary relief:

> "Such cases require a balancing of public and private interests of various sorts. Where, as here, the acquisition would be neither horizontal nor vertical, there are 'strong reasons for not making the prohibitions of Section 7 so extensive as to damage seriously the market for capital assets, or so broad as to interfere materially with mergers that are procompetitive in their facilitation of entry and expansion that would otherwise be subject to serious handicaps.' These reasons are especially compelling when the target company fails to show that the alleged antitrust violation would expose it to any

readily identifiable harm." (App. A at 3a) (Footnote omitted).

In substance, therefore, the court below held that, because of the character of plaintiffs such as Petitioner, "strong [but unidentified] reasons" require that the interests of "the market for capital assets" be included on the side of the equitable scale favoring the acquiring company, (App. A at 3a). The test is thus not so much the public interest in preserving competitive markets but the private character and integrity of the parties.

In this view the Court of Appeals failed sufficiently to consider the fundamental national policy, embodied in the antitrust laws, of promoting competition by preventing anticompetitive conduct and the formation of anticompetitive market structures through private antitrust litigation. Its approach thus conflicts with the principle established by this Court in *Perma Life Mufflers, Inc.* v. *Int'l Parts Corp.*, 392 U.S. 134 (1968), where it was the holding that the public interest in encouraging private enforcement of the antitrust laws completely overrode any court-perceived deficiencies in the character of the particular private antitrust plaintiff, to the extent that a plaintiff with "unclean hands" or *in pari delicto* may proceed:

> "The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. *A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement.*" 392 U.S. at 139 [Emphasis supplied]

Accord: Simpson v. *Union Oil Co.*, 377 U.S. 13 (1964); *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U.S. 211 (1951). *See, also, Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931); *cf. Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962).

In addition, the court nowhere considered the fact that, should a target company be acquired prior to a plenary trial on the merits of the antitrust claims, there is the probability that such a trial may not ever occur, thus at least hindering the vindication of the public interest in the enforcement of the antitrust laws. The following observation is particularly apposite:

> "In the private Section 7 case, the movant [for preliminary relief] is typically a corporation threatened with a takeover and unless its motion is granted the litigation will come to an end; *obviously a defendant which successfully defeats a private plaintiff's motion to enjoin a takeover, upon completing the takeover, will not brook maintenance of an action against itself. In the private action therefore a preliminary injunction barring a takeover of control will often be essential to assure that a trial on the merits can occur.*" Lewis, *Preliminary Injunctions in Government Section 7 Litigation*, 17 Antitrust Bull. 1, 6 (1972) (emphasis supplied; footnote omitted).

CONCLUSION

For the reasons set forth above, Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit.

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APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1090—September Term, 1973.
1091

(Argued May 3, 1974 Decided June 10, 1974.)

Docket Nos. 74-1024
74-1025

MISSOURI PORTLAND CEMENT COMPANY

Plaintiff-Appellant-Appellee,

v.

CARGILL, INCORPORATED,

Defendant-Appellee-Appellant,

and

THE FIRST BOSTON CORPORATION,

Defendant.

Before:

WATERMAN, FRIENDLY and MULLIGAN,
Circuit Judges.

Appeal from an order of the District Court for the Southern District of New York, Charles E. Stewart, Jr., *Judge*, granting a preliminary injunction enjoining de-

fendant Cargill from further soliciting the tender of shares of plaintiff pending final determination of the action and providing for other relief. Reversed, with instructions to issue a modified injunction.

DANIEL F. KOLB, ESQ., New York, N.Y. (Davis Polk & Wardwell and Charles J. Moxley, Jr., Esq., William T. Bickerstaff, Esq., Dale L. Matschullat, Esq., and Rhea Kemble Neugarten, Esq., of Counsel), *for Missouri Portland Cement Company.*

GORDON B. SPIVACK, ESQ., New York, N.Y. (Lord, Day & Lord, and John W. Castles 3d, Esq., Michael J. Murphy, Esq., David H. Marks, Esq., and Stephen J. Crimmins, Esq., of Counsel), *for Cargill, Incorporated.*

FRIENDLY, *Circuit Judge:*

This appeal illustrates the growing practice of companies that have become the target of tender offers to seek shelter under § 7 of the Clayton Act, 15 U.S.C. § 18. Drawing Excalibur from a scabbard where it would doubtless have remained sheathed in the face of a friendly offer, the target company typically hopes to obtain a temporary injunction which may frustrate the acquisition since the offering company may well decline the expensive gambit of a trial or, if it persists, the long lapse of time could so change conditions that the offer will fail even if, after a full trial and appeal, it should be determined that no antitrust viola-

tion has been shown. Such cases require a balancing of public and private interests of various sorts. Where, as here, the acquisition would be neither horizontal nor vertical, there are "strong reasons for not making the prohibitions of section 7 so extensive as to damage seriously the market for capital assets, or so broad as to interfere materially with mergers that are procompetitive in their facilitation of entry and expansion that would otherwise be subject to serious handicaps." [1] These reasons are especially compelling when the target company fails to show that the alleged antitrust violation would expose it to any readily identifiable harm.

I

On December 19, 1973, Cargill, Incorporated (Cargill) announced an offer to purchase all the outstanding shares of common stock of plaintiff Missouri Portland Cement Company (MP).[2] In its offer, Cargill stated that it intended to acquire control of MP and either operate it as a subsidiary or merge it into the parent company. The purchase price was $30 per share in cash; this compared with a closing market price of $24.25 on December 18, 1973.

Two days later, MP began this action in the District Court for the Southern District of New York, seeking to enjoin Cargill from continuing with the tender offer. MP

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[1] Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313, 1318 (1965).

[2] There were approximately 1,440,000 shares of MP outstanding on December 19, 1973.

charged that Cargill had violated the securities laws in the course of publicizing its offer and that an acquisition of control by Cargill of MP or a merger of MP into Cargill would violate the antitrust laws. Again running true to the usual form, Cargill responded with accusations that MP had violated the securities laws in its public pronouncements opposing the tender offer and sought injunctive relief on its counterclaim. Judge Stewart held hearings on December 27, 1973, and on five days in early January 1974. These led to an order dated January 7, 1974, which, without any accompanying findings of fact or conclusions of law, enjoin Cargill from proceeding with the tender offer during the pendency of the action and placed both companies under certain other restraints. By this time Cargill had acquired 271,000 shares of MP, or approximately 19% of the total, at a cost of roughly $8,130,000.00. A panel of this court ordered an expedited appeal, with briefs to be filed one week after entry of the district court's findings of fact and conclusions of law and with argument to be heard in the following week.

On April 15, 1974, the district court entered its opinion and amended order. The court held that MP had raised "substantial and difficult antitrust questions" which merited further investigation. Finding that the balance of equities was in MP's favor, the court held that MP was entitled to preliminary relief on the antitrust claim. However, it rejected MP's claims that Cargill had violated the securities laws. On the counterclaim, it upheld one of Cargill's securities law claims but denied the rest. The court temporarily enjoined Cargill from proceeding with the tender offer or voting its stock and dealt with MP's viola-

tion of the securities laws in a manner recounted in the final section of this opinion. As both sides recognize, the critical determination was the court's finding of a probable antitrust violation, to which we now turn.

II

There is not much controversy over the basic facts. We shall limit ourselves to the highlights, referring to Judge Stewart's as yet unreported opinion for amplification.

MP, a publicly held corporation whose stock is listed on the New York Stock Exchange, manufactures portland cement at three riverfront plants. One is located at St. Louis, Missouri, on the Mississippi River; another is at Independence, Missouri, on the Missouri River; and the third is at Joppa, Illinois, on the Ohio River near its confluence with the Mississippi. MP sells the cement produced at these plants through an eleven-state area. Several dozen competitors, including five with plants in Missouri on the Mississippi River, sell in various parts of this area, shipping much of their cement through distribution terminals located along the three great river systems. MP's production capacity is 10,000,000 barrels a year[3]—this being some 2% of the national capacity and 8% of the capacity within the eleven states MP serves. It is the

[3] The current expansion of MP's Joppa plant will raise the company's capacity to 14,000,000 barrels.

Traditionally, cement capacity has been measured in barrels, although the industry is in the process of converting to the use of tons. One ton of cement is equal to about 5.32 barrels. We shall refer to capacity in barrels throughout since the parties used that scale in most of the proceedings in this case.

country's twentieth largest cement producer; eight of the ten largest producers compete in part of MP's sales territory.

The district court focused its attention not on the eleven-state area but on four particular metropolitan markets within that area—St. Louis and Kansas City, Missouri; Memphis, Tennessee; and Omaha, Nebraska. Figures supplied by MP[4] showed the characteristics of these markets to be as follows:

St. Louis, Missouri Metropolitan Marketing Area

Missouri Portland Cement	28%
River Cement	24
Alpha Cement	20
Universal Atlas Cement	18
Dundee Cement	10

[4] MP's market share figures have been a source of some controversy here. They were provided by Richard J. Whyte, MP's Vice President of Sales, who stated in an affidavit that he derived the figures "from my 15 years experience in the marketing of cement as well as my knowledge of competitive factors in these metropolitan area markets." His affidavit gave no indication how precise the figures purported to be or what boundaries he had used for each metropolitan marketing area. Cargill complains that Whyte's figures give no time period for the alleged market shares, and that they fail to take into account the production capacity of plants near each geographical submarket, which could readily increase their shipments to the market. *Cf. United States* v. *General Dynamics Corp.*, —— U.S. ——, 42 U.S.L.W. 4368, 4371-73 (Mar. 19, 1974) (past production statistics not necessarily the best index of ability to compete in the future).

Kansas City, Missouri Metropolitan Marketing Area

Missouri Portland Cement	30%
Lone Star Cement	25
Ash Grove Cement	22
Universal Atlas Cement	12
Monarch Cement	5
General Portland Cement	4
Dewey Cement	2

Memphis, Tennessee Metropolitan Marketing Area

Missouri Portland Cement	30%
Marquette Cement	27
River Cement	21
Arkansas Cement	10
Others	12

Omaha, Nebraska Metropolitan Marketing Area

Ash Grove Cement	62%
Missouri Portland Cement	21
Lone Star Cement	10
Ideal Cement	5
Others	2

The record contains no figures to indicate the proportion of MP's sales represented by these four marketing areas; however, MP's figures show that in the company's other major metropolitan markets, Chicago, Louisville and Nashville, it has 9%, 10% and 15% of the market, respectively. Those shares make MP the third leading cement supplier in Louisville and Nashville, and the seventh in Chicago.[5]

[5] MP has river terminals at Decatur, Alabama; Nashville, Tennessee; Owensboro, Kentucky; Louisville, Kentucky; Peoria, Illinois; and Chicago, Illinois, in addition to those at Memphis and Omaha.

Cargill is a huge privately held company with its headquarters in Minneapolis, Minnesota. It has been engaged in grain trading for over a century. Since 1932 it has operated river barges which carry bulk commodities and tow boats which push the barges. It has expanded into a variety of other bulk commodity businesses—vegetable oil processing, animal feeds, sugar trading, ores and metals, fertilizers, ocean shipping, flour milling, corn wet milling, the manufacture of industrial chemicals, poultry products and salt mining. Cargill's policy is to derive profits by selling a large volume at low margin.[6]

In August 1972, Cargill's Salt Department established the Salt Expansion and Diversification Group (Salt Group) to investigate expansion opportunities for the company. The Salt Group reported to the previously established Long Range Planning Committee of Cargill's board of directors, which was responsible for aiding the chief executive in framing recommendations for the board. After investigating a number of other industries, the Salt Group in the fall of 1972 determined that cement was a particularly promising prospect for Cargill and commissioned an extensive study of the industry. Stuart Leisz, a member of the Salt Group, was assigned to supervise the study. He retained a former cement company president as a consultant and undertook to explore the possible avenues of entry for Cargill into the cement business. After as-

[6] Cargill's net income for fiscal 1973 was $107,800,000 on sales of $5,300,000,000. Over the last five years, its high volume-low margin approach has produced net profits of 1.3% of sales. The district court's opinion contains a more detailed account of Cargill's development and diversification programs.

sembling financial and other data on every cement company in the country, Leisz on March 26, 1973, submitted a comprehensive report to the Salt Group recommending that Cargill acquire a cement plant producing between 1½ and 3 million barrels per year. He specifically advised against entering the industry as a new producer for four reasons: (1) the cost of plant construction was prohibitively high—estimated at $10-12 per barrel of annual capacity; (2) Cargill's "limited knowledge of cement production and the basic major differences between our Salt Department and the cement industry" would render a "trial and error start-up" too risky; (3) the delay that would be required for construction and for forming a new organization would be too long—three to four years by Leisz' estimate; and (4) the company might encounter a shortage of qualified production personnel to operate a new plant.

During the summer of 1973, Leisz continued his study of the industry, contacting various cement companies in order to determine what plants might be available for purchase. In late September, the Salt Group rendered a comprehensive report to the Long Range Planning Committee based on Leisz' findings. The report advised that the most promising method of entry would be to acquire an established production unit by purchase or tender offer; it estimated that production facilities could thus be acquired at a cost of approximately $3-4 per annual barrel capacity. The report suggested that if the company chose the purchase route, either Valley Cement in Mississippi or Coplay Cement in Pennsylvania would provide Cargill "a good entrance into the cement business." Among five

possible tender offer candidates, MP was the clear first choice.[7] The report termed entry by construction a "low priority option" and recited several of the same considerations that had led Leisz to recommend against that course.

The Long Range Planning Committee concluded that acquiring MP was "the number one priority," and it approved proceeding with acquisition plans if 51% of MP's stock could be acquired at a reasonable price.[8] The committee discarded "out of hand" the possibility of entering the industry by construction, and the proposal to buy Valley, Coplay or another small cement company "wasn't taken seriously" as Cargill's chief executive testified.[9]

In October 1973 Cargill contacted MP and was informed that the management had no interest in selling. Cargill then approached the United States Steel Corporation whose subsidiary, Universal Atlas, is one of the largest cement companies in the business, and Dundee Cement Company, owned by Holderbank Financiere Glaris, a Swiss holding company, neither of which was interested in selling. Amcord Cement Company was rejected because the price was too high and because the owners would sell the cement operations only as part of a package with several money-losing non-cement companies. The Mississippi River Cor-

[7] Cargill's Finance Department did a parallel study of possible tender offer candidates in the cement industry and concluded, as did the Salt Department, that MP was the best prospect.

[8] The committee also determined to look into the possibility of purchasing the Amcord Cement Company.

[9] Erwin Kelm, Cargill's chief executive, noted that upon investigation both Valley and Coplay were found to be high overhead operations, without adequate transportation facilities.

poration, owner of River Cement, demanded a price of $65,000,000, which Cargill considered prohibitive for that company's 6,000,000 barrel capacity. Cargill's board of directors thereupon directed that the tender offer be made for all the outstanding shares of MP stock.

III.

Preliminarily, we note that the issue of relevant geographical markets is not seriously contested at this juncture.[10] We therefore accept, for the purposes of this ap-

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[10] Cargill argued below that the smallest proper geographical market in this case is the eleven-state area in which MP sells cement. For the purposes of this appeal, however, Cargill assumed the correctness of the district court's geographic submarket determinations, although it challenged the validity of MP's market share figures, see fn. 4, *supra*.

In support of its claim that the metropolitan areas are the relevant markets, MP cites *United States Steel Corp.* v. *FTC*, 426 F.2d 592, 596 (6 Cir. 1970), followed in *Mississippi River Corp.* v. *FTC*, 454 F.2d 1083, 1090 (8 Cir. 1972). In the *U.S. Steel* case, the court approved the FTC's finding that the proper geographic market for *ready-mixed concrete* was metropolitan, while the proper market for *portland cement* was regional (including an area extending from Maryland to New Hampshire).

At the trial on the merits, the district court should give careful consideration to additional economic factors in determining whether metropolitan areas are realistic geographical markets for portland cement. For example, the sales range from each terminal may be limited to roughly 200 miles, as the court below found, but a producer can substantially expand the sales range from a single plant by installing terminals in more distant markets, as a number of companies such as Atlantic, Dundee and Huron have done. Since installing terminals is relatively cheap, the barriers to entry into a given metropolitan submarket may be so low for any regional producer that it is unrealistic to consider each metropolitan area as an independent market.

Also, even accepting the district court's conclusion that metropolitan areas are the proper geographical markets, we do not

peal, the district court's ruling that the relevant "section [s] of the country" in which competition is allegedly being foreclosed, 15 U.S.C. § 18, are the four metropolitan markets described above.

Before proceeding further it is well to emphasize that we are not dealing here with the types of merger that have been the historic concerns of the antitrust laws. The case differs totally from the horizontal merger, illustrated by *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963), where two direct competitors, the second and third largest banks in Philadelphia, proposed to merge. It differs likewise from the vertical merger which, as was said in *Brown Shoe Co.* v. *United States, supra*, 370 U.S. at 324, "by its very nature, for at least a time, denies to competitors of the supplier the opportunity to compete for part or

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find it at all clear how Cargill's acquisition of MP could have an adverse competitive effect in the Omaha market. There Ash Grove Cement, with a large plant at Louisville, Nebraska, on the Platte River, has acquired 62% of the market as against the 21% obtained by MP through barging cement from its plant at Independence, Missouri, 2% by Ideal Cement which has a plant in South Central Nebraska, and 10% by Lone Star Cement, the country's second largest cement producer. So far as appears from the record, any improvement of MP's position seems as likely to be at the expense of Ash Grove as of Lone Star or Ideal; the effect of the acquisition on the Omaha market may therefore be affirmatively procompetitive, cf. *Brown Shoe* v. *United States*, 370 U.S. 294, 319 (1962). See Note, *Toehold Acquisitions and the Potential Competition Doctrine*, 40 U. Chi. L. Rev. 156, 179 (1972) ("the second largest firm in a very concentrated market might be available as a toehold [and therefore legal acquisition] when the largest firm has 60 percent of the sales); see also Fox, *Toehold Acquisitions, Potential Toehold Acquisitions and Section 7 of the Clayton Act*, 42 Antitrust L.J. 573, 582 (1973). If necessary, any issues concerning the Omaha market can be further explored on remand.

all of the trade of the customer-party to the vertical arrangement." Despite MP's suggestions to the contrary, the merger between Cargill and MP is not even a true "product-extension merger," as the Federal Trade Commission characterized the proposed marriage of Procter & Gamble and Clorox, *FTC* v. *Procter & Gamble Co.*, 386 U.S. 568, 577-78 (1967). In that case, Procter's detergents and Clorox's bleach were so closely related that Procter could expect substantial competitive advantages of various sorts from adding Clorox to its product line. As the Commission pointed out, 63 F.T.C. 1465, 1544 (1963), quoted in *FTC* v. *Procter & Gamble Co.*, *supra*, 386 U.S. at 573-74:

> Packaged detergents—Procter's most important product category—and household liquid bleach are used complementarily, not only in the washing of clothes and fabrics, but also in general household cleaning, since liquid bleach is a germicide and disinfectant as well as a whitener. From the consumer's viewpoint, then, packaged detergents and liquid bleach are closely related products. But the area of relatedness between products of Procter and Clorox is wider. Household cleansing agents in general, like household liquid bleach, are low-cost, high-turnover household consumer goods marketed chiefly through grocery stores and presold to the consumer by the manufacturer through mass advertising and sales promotions. Since products of both parties to the merger are sold to the same customers, at the same stores, and by the same merchandising methods, the possibility arises of significant integration at both the marketing and distribution levels.

The relationship between Cargill's bulk commodities business and the cement industry bears only the most super-

ficial resemblance to the product affinity between Procter and Clorox. The broad strokes with which MP attempts to characterize the similarities between cement manufacturing and salt mining, for example, fall far short of the mark. Salt and cement reach different purchasers; advertising is not a major factor in the bulk sales of either product; there is no complementary use of the two goods; and the possibility of integrated production or distribution is remote. MP presses most energetically its claim that Cargill's long experience with river barge transportation of bulk commodities will give it a substantial advantage in the cement trade. Apart from the fact that Cargill's present barges may not be appropriate for cement at all, this congruity between Cargill's experience and cement distribution methods is not nearly enough to convert cement and other bulk commodities into "related products" in the sense that the *Procter & Gamble* Court used the term.[11] Cargill's interest was simply in further diversification and in profitable use of its capital in a business where it considered that its general skills in handling bulk commodities might enable it to be more successful than an acquirer whose only asset was a deep pocket.

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[11] Since MP already has a fleet of 34 river barges specially equipped for cement transportation, it is not clear that Cargill's barging facilities would be of substantial aid; in any event, barging would not be used in the St. Louis and Kansas City markets, where MP plants are located. The alleged similarities in marketing and production between cement and bulk commodities are not impressive. Even though both salt and cement require mining facilities and are often sold in bulk lots to industrial users, these similarities are not the sort that would be likely to produce overwhelming competitive advantages through the joint operation of the two enterprises. Finally, salt production is an extremely small part of Cargill's business—about 6/10 of 1% in sales.

On these facts, it would be rather hard for the mind not initiated into the intricacies of antitrust law to see how the effect of Cargill's acquisition of control of MP "may be substantially to lessen competition, or to tend to create a monopoly," as forbidden by § 7 of the Clayton Act, even though some other form of entry by Cargill would be more beneficial to competition. The vices of an oligopolistic market lie in price and other agreements among the oligopolists, often impossible to prove,—or what amounts to nearly the same thing—their slothful acquiescence in a state of affairs beneficial to all. Acquisition of one of the oligopolists by a more efficient company intent on acquiring a larger market share will break the explicit or implicit agreement or the condition engendered by the sloth.[12] The danger is that the acquirer may be so powerful and so wicked as to create a threat that oligopoly will progress toward monopoly. But the very fact that oligopoly assumes a small number of relatively well-entrenched companies gives some assurance against this; under such conditions the threat of monopolization would not seem of real consequence in the absence of a showing of overwhelming competitive advantage not present here or evidence equally absent that the acquirer intends to engage in predatory tactics. While counsel for MP makes much of a reported comment by a Senior Vice President of Dundee Cement

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[12] As was noted in ABA, Antitrust Developments 68 (1968), a conglomerate merger is not necessarily anti-competitive, but may actually promote competition as, for example, "where the conglomerate enterprise displaces a stagnant or inefficient firm in an industry dominated by a few powerful firms." See also Note, 72 Mich. L. Rev. 837, 852 (1974).

who feared that Cargill's size and aggressiveness would make it a bull in a china shop, this would seem to cut rather in Cargill's favor. Introducing a bull into a china shop is a good way to break through the comfortable vices of oligopoly.[13] The very fact that the markets were oligopolistic would make acquisition of one of the oligopolists by a strong company with Cargill's business philosophy more likely to bring down prices and promote service than in a market where free competition had already done this. To be sure, it is possible that after acquiring MP, Cargill might become simply another slothful oligopolist but, if so, matters would not be significantly worse than now.

We are told, however, that what seem to be such homely truths are inconsistent with the doctrines of "potential competition" and "entrenchment." In pressing its potential competition argument, MP principally relies on five Supreme Court decisions; *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964), complaint dismissed on remand, 246 F. Supp. 917 (D. Del., 1965), *aff'd by an equally divided Court*, 389 U.S. 308 (1967); *FTC* v. *Procter & Gamble Co.*, *supra*, 386 U.S. 568 (1967); *Ford Motor Co.* v. *United*

[13] The context in which the "china shop" comment was made lends support to the view that Cargill's entry might well be procompetitive. The head of the Salt Group reported that Dundee's representative "[f]elt if Cargill was getting into cement that he would offer his advice so our entry wasn't too disruptive. He said 'the cement industry is a china shop and with Cargill's size and aggressiveness I don't want the bull to do too much damage.'" The record affords no indication that Cargill had any interest in the proferred advice.

States, 405 U.S. 562 (1972); and *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526 (1973).[14] While MP insists that each of these decisions is favorable to its position, it relies most heavily on *Penn-Olin*, *Procter & Gamble* and *Falstaff*.

Although the Supreme Court in effect applied a concept of potential competition in the *El Paso Natural Gas* case, it was in *Penn-Olin* that the Court began to sketch the role that the doctrine would play in § 7 analysis.[15] The district court in *Penn-Olin* had found that both Pennsalt and Olin Mathieson were engaged in producing sodium chlorate or similar chemicals, and that expansion into sodium chlorate production in the Southeast United States would be a natural step for either company. However, the lower court found that the two companies would not *both* have entered the market independently. On the basis of that finding, it

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[14] MP also relies heavily on *Kennecott Copper Corp.* v. *FTC*, 467 F.2d 67 (10 Cir. 1972), *cert. denied*, U.S. , 42 U.S.L.W. 3555 (Apr. 1, 1974), the facts of which are closer to those here presented than any of the Supreme Court cases. However, that decision has been cogently criticized, 86 Harv. L. Rev. 772 (1973), and while we surely would not be prepared to say without further study of the facts that we disagree with it, we are equally unprepared to accept it as correctly interpreting § 7.

[15] The *El Paso* case provides little guidance because the anticompetitive effect of El Paso's acquisition of its sole prospective competitor was so obvious that the Court was not pressed to explore the limits of the potential competition doctrine. Even though Pacific Northwest Pipeline was not technically a current competitor of El Paso in the California market, the Court noted that Pacific's threats to El Paso's hegemony there had already had demonstrable effects on the price of natural gas in California, 376 U.S. at 654-55. Where the prospective competitor has made a concerted effort to break a monopolist's hold on the market, the line between potential and natural competition, loses much of its significance. "Unsuccessful bidders," the Court concluded, "are no less competitors than the successful one," 376 U.S. at 662.

dismissed the complaint charging that the two companies had violated § 7 by forming a joint venture to market sodium chlorate in the Southeast. The Supreme Court reversed. Even if only one of the companies would have entered on its own, the Court held, there was a theory on which the Government could have prevailed, 378 U.S. at 173:

> There still remained for consideration the fact that Penn-Olin eliminated the potential competition of the corporation that might have remained at the edge of the market, continually threatening to enter. Just as a merger eliminates actual competition, this joint venture may well foreclose any prospect of competition between Olin and Pennsalt in the relevant sodium chlorate market.

While the Court did not distinguish clearly between the present effect on competition of a company threatening to enter the market and the prospective effect on competition of a company that may enter the market in the future, see *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526, 559-62 (1973) (Marshall J., concurring), it plainly sanctioned the general applicability of the potential competition doctrine to § 7 cases.[16] However, beyond suggesting

[16] In noting that the Pennsalt-Olin joint venture "may well foreclose any prospect of competition between Olin and Pennsalt," 378 U.S. at 173, the Court seemed to be primarily concerned about the future anticompetitive effect of eliminating an actual potential entrant. In a later passage, however, the Court wrote, "[t]he existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated," 378 U.S. at 174, which seems to look to the present procompetitive effect of a potential entrant poised on the edge of the market.

the broad parameters of the doctrine, *Penn-Olin* provides little comfort to MP. As we shall see, Cargill has no permanent commitment to the cement industry of the sort that both Pennsalt and Olin had to chemicals such as sodium chlorate. The "incentive to competition" that the *Penn-Olin* Court instructed the district court to look for was not shown in this case and could hardly be expected to flow from Cargill's relatively brief investigation of the cement industry. And while the *Penn-Olin* joint venture had strong overtones of both horizontal and vertical combination,[17] those elements are missing here.

The next case, *Procter & Gamble*,[18] is distinguishable on a number of grounds. We have already adverted to one—the close relationship of packaged detergents, Procter & Gamble's most important product line, and household liquid bleach, in use and consequently in customers and methods of sale. This was significant in many ways. One was to discredit the assertion that Procter & Gamble would never have entered the bleach business on its own account.[19] A

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[17] The Court in *Penn-Olin* pointed out that Olin was a purchaser of sodium chlorate for internal consumption and that the process used in making sodium chlorate was "intimately related to other operations of Olin and required the same general knowledge," 378 U.S. at 166. Pennsalt had long been involved in the production of sodium chlorate in the West, and had marketed the product in the Southeast for several years.

[18] For a perceptive analysis of the *Procter & Gamble* case and its implications, see *Handler, Twentieth Annual Antitrust Review—1967*, 53 Va. L. Rev. 1667 (1967).

[19] Although Mr. Justice Harlan in his concurring opinion, 386 U.S. at 586, professed to think that the Court "certainly cannot mean to set its judgment on the facts against the concurrent findings [on this issue] below" by both the FTC and the Sixth Circuit, we are not so sure it did not do precisely that, and with much reason.

closely related one was that even if Procter would not so have entered, the nature of its business would make it appear a likely prospective entrant to the various liquid bleach producers.[20] The feasibility of combined advertising and sales effort[21] not only would assist Clorox in increasing its 48.8% share of the liquid bleach market (much higher than that in certain areas) but would discourage other entrants. Here there is no close similarity in products, customers, or marketing techniques, and nothing to show that acquisition of MP by Cargill would significantly raise the barriers to entry in the cement industry. Beyond this, there was evidence in *Procter & Gamble* that after the acquisition Clorox had already demonstrated what would happen to a competitor seeking to increase its market share

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[20] This is obviously not true here. There is no evidence that anyone in the cement business thought of Cargill as a potential entrant until Cargill publicized its interest in the spring of 1973, or that anyone will regard it as such a prospect if its acquisition efforts fail. Putting the matter another way, the nature of Procter's business was so close to the bleach industry that it was and would continue to be looked on as a likely potential entrant. The nature of Cargill's business is so different from the cement industry that it seems almost certain it had never been looked upon as a potential entrant and will no longer be if it is denied access in what it rationally considers to be the only feasible way. The judge's finding "that Cargill is just as likely an entrant into the cement industry as Procter was into liquid bleach," while correct enough if limited to the point that Cargill may have wanted to enter the cement business as much as Procter & Gamble wanted to enter the liquid bleach business, is in clear error if meant to imply—and this is what is really significant—that Cargill would be viewed as remaining as likely a potential entrant as Procter even if its acquisition of a major cement producer was blocked.

[21] Procter was the nation's leading advertiser, spending more than $80,000,000 a year on advertising and an additional $47,000,000 on sales promotion.

by stepping up promotion, 386 U.S. at 579 n.3. Review of Mr. Justice Harlan's typically thoughtful concurring opinion, 386 U.S. at 581-604, further demonstrates the many differences between *Procter & Gamble* and this case.

In *United States* v. *Falstaff Brewing Corp., supra,* 410 U.S. 526 (1973), the most recent "potential competition" case,[22] the Court, as in *Penn-Olin,* reversed and remanded for the district court to consider an alternate theory of liability. Falstaff, the fourth largest beer producer in the United States, was the only major producer that did not sell in New England. After some years of publicly expressing its desire to enter the Northeast market, it acquired Narrangansett, the largest seller of beer in the New England states. The district court had dismissed the Government's complaint on the basis of a finding, with which a majority of the Court did not quarrel,[23] that Falstaff's management was unwilling to enter the New England market except by acquiring a substantial existing brewery. The Court reversed and remanded on the ground that it was an error of law to assume "that because Falstaff, as

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[22] *Ford Motor Co.* v. *United States, supra,* 405 U.S. 562, upon which MP relies, has little or no bearing here. The Court in that case approved a district court holding that Ford's acquisition of a substantial spark plug plant violated § 7. Since Ford was a primary consumer of spark plugs, the case presented a classic instance of vertical foreclosure. In addition, since Ford would continue to need spark plugs as long as it manufactured automobiles and trucks, it was clearly a potential *de novo* entrant into the industry. No such vertical foreclosure was even suggested to exist in this case.

[23] This holding was in the portion of Mr. Justice White's opinion that was joined by Mr. Justice Douglas, giving it the support of four members of the Court of seven, see fn. 25, *infra.*

a matter of fact, would never have entered the market *de novo*, it could in no sense be considered a potential competitor"; it still might be a potential competitor "in the sense that it was so positioned on the edge of the market that it exerted beneficial influence on competitive conditions in that market," 410 U.S. at 532-33. The district court was therefore directed "to make the proper assessment of Falstaff as a potential competitor," taking this point into account, 410 U.S. at 537. The Court left "for another day the question of the applicability of § 7 to a merger that will leave competition in the marketplace exactly as it was, neither hurt nor helped, and that is challengeable under § 7 only on grounds that the company could, but did not, enter *de novo* or through 'to-hold' acquisition and that there is less competition than there would have been had entry been in such a manner." 410 U.S. at 537.[24]

Although *Falstaff* is a hard decision to parse because of the number of opinions and abstentions,[25] the only addition it makes to *Procter & Gamble* is that in *Falstaff* the "edge of the market" factor stood more nearly alone. But the case was like *Procter & Gamble*, or perhaps even easier for the Government, in that the very nature of Falstaff's

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[24] Because of this, the result was a remand rather than a reversal.

[25] Mr. Justice White wrote for the Chief Justice, Mr. Justice Blackmun and himself, Mr. Justice Douglas joined in Part I of Mr. Justice White's opinion but would have preferred to reverse and direct judgment for the Government. Mr. Justice Marshall thought the finding of no intent to make a *de novo* entry was based on inadequate exploration of the facts. Mr. Justice Rehnquist and Mr. Justice Stewart dissented. Mr. Justice Brennan and Mr. Justice Powell did not participate.

business would inevitably keep it on the edge of the market. Falstaff was the only one of the nation's largest beer producers which did not sell throughout the country. No matter how much it protested that it would not make a *de novo* or toe-hold entry into the Northeast, companies in the market might well not believe this; Falstaff would therefore remain a procompetitive force even if not allowed to enter the market in the way it wished.

We see no sufficient analogy between the positions of Procter & Gamble and Falstaff on the one hand, and Cargill on the other. Obviously Procter & Gamble had no intention of getting out of the detergent business or Falstaff out of the beer business and, so long as that continued, firms in the bleach or beer markets would fear their entry. But, as already indicated, there is no evidence that anyone in the cement business had dreamed of Cargill as a potential entrant until it sent out letters seeking information about the industry in March 1973. And there is no reason to believe that, if its current effort to enter the industry is frustrated, anyone in the cement business will regard it as a potential entrant in the future. The district court's error lay in identifying, for purposes of potential competition, a company making the same commodity (Falstaff) or a closely related one sold to the same purchasers by the same means (Procter & Gamble) with a diversifying company that had never before been regarded as a potential entrant and was not likely to remain one if its rational choice of a method of entry was barred.

The evidence against the feasibility of *de novo* entry by Cargill is overwhelming, and the district judge made no

finding that this was an attractive possibility or that anyone inside or outside Cargill ever thought it was.[26] Whatever the ultimate resolution of the differing views of Mr. Justice White and Mr. Justice Marshall on the weight to be given statements by management of the acquiring company, contrast 410 U.S. at 534-36 with *id.* at 563-70, here the objective evidence was wholly in accord with the views expressed by Cargill's management. An attempt to construct facilities similar to MP's, which Cargill hoped to acquire for $45,000,000, would cost up to $200,000,000. The difference in cost per annual barrel of capacity was that between $3-4 and $10-20. As against this and other objective facts cited by the Salt Group, to which we have referred above, the point that Cargill had made *de novo* entries into other businesses, where there was no showing of a similar cost disparity, is quite irrelevant.[27]

The judge did find, however, "that there is no evidence that Cargill would not enter the cement industry through some other company if it did not acquire Missouri Portland." This, of course, is not the same as saying there was evidence that it would. Apart from that, the statement affords no support to the decision if it includes producers with market shares substantially as large as MP's

[26] In footnote 15 of his opinion, the district judge referred to the fact that the district court in *Falstaff* "faced evidence that management had consistently rejected *de novo* or toehold entry," 410 U.S. at 530, but said "[t]here is no such evidence in the instant case." With respect to *de novo* entry, virtually all the evidence was that way. At one point during the hearings, even MP's counsel conceded that Cargill "can't enter de novo."

[27] So also is the fact that there had been *de novo* entrants into the cement business in the 1960's. We can take judicial notice how far construction costs have outpaced commodity prices since that time.

since an acquisition bad as regards MP would be equally bad as to them. Presumably therefore the judge was referring to "toe-hold" acquisitions, and to that we now turn.

The "toe-hold" notion is rather difficult to understand as applied to a capital intensive industry where objective facts rule out *de novo* entry and the proposed entrant has no interest in entering unless it can obtain a significant market share. The cost of converting a small plant into a big one would probably be as great as, or perhaps greater than, that of building a new one. Toe-hold acquisition may therefore be meaningful in an industry like cement only if the new entrant could make a number of such acquisitions having capacity substantially equivalent to that of the larger company sought to be acquired.

Beyond this, we think MP completely failed to demonstrate that attractive toe-hold prospects were available in the relevant geographical markets. The plants cited as available means of entry into the defined markets are either already dominant in some other market, or owned by enormous national or international cement companies, or poor prospects for the future.

Judge Stewart found that Cargill had discussed the possibility of acquiring several other cement companies, including Valley, Alpha, American, Coplay and River. In addition, he noted that after initially being turned down by MP, Cargill recontacted Universal Atlas, Amcord, Dundee and River. None of these would qualify as toe-hold candidates. Alpha, River and Universal Atlas all have substantial shares of the St. Louis market; Dundee has a

substantial share in both St. Louis and Chicago: Valley has seemingly insuperable technological problems;[28] and the Coplay and Amcord plants are too far from the four markets in question to have a realistic prospect of competing there.

In its reply brief in this court, MP pointed to Monarch, Arkansas Cement Corp., Texas Industries, and Gifford-Hill as possible toe-hold acquisittion firms. Apart from the propriety of considering possibilities which were not specifically brought to the district court's attention, none of these seems to qualify. Monarch, it was pointed out in oral argument, is a land-locked plant in southeastern Kansas with only about 30 years of limestone reserves. The other three are located at some distance from the four markets in question and are almost certainly major participants in other markets.[29] MP's potential competition argu-

[28] Even if Valley could compete actively in Memphis or St. Louis from its plant on the Yazoo River in Mississippi, Cargill had concluded that Valley suffers from poor quality limestone, limited reserves and river conditions that make barging on the Yazoo impossible in certain seasons.

[29] Texas Industries, with a terminal in Memphis, already competes in that market to a limited extent, apparently by shipping from its Artesia, Mississippi, plant. However, that company would not seem to be a likely toe-hold prospect at this point since its Mississippi plant has more than 40% of that state's production capacity and its Texas plant has about ⅓ of the production capacity in the Dallas-Ft. Worth area. Gifford-Hill poses much the same problem. The Arkansas Cement Co., wtih 10% of the Memphis market, is probably too substantial to be considered a true toe-hold candidate; in any event it appears to be a leading seller in Arkansas.

ments thus are inadequate to support a finding of probable illegality.[30]

In addition to its potential competition claims, MP has advanced the "deep pocket" or "entrenchment" theory to support its claim that Cargill's acquisition would violate § 7. According to this theory, an acquisition by a firm with extraordinary resources might raise entry barriers in a particular industry by discouraging other potential entrants, or it might discourage competitive challenges from smaller rivals fearful of provoking the giant. Again, MP relies on the *Procter & Gamble* case for support. The Court there pointed out that Procter's acquisition of the dominant liquid bleach producer might render the smaller competitors "more cautious in competing due to their fear of retaliation by Procter," 386 U.S. at 578, and that Procter's advantages in advertising would give it a peculiarly powerful weapon with which "to meet the short-term threat of a new entrant," 378 U.S. at 579. In the cement industry, however, the "deep pocket" claim seems more metaphorical than real. Many of the companies in the

[30] Cargill also argues with considerable force that, even if MP could show that there were reasonable toe-hold prospects, it would also have to show that Cargill was one of the most likely entrants, since otherwise its elimination as a potential entrant would not have an appreciable anti-competitive effect. MP's proof in this regard was not very impressive. Any cash-rich, diversifying corporation in a bulk, non-consumer industry might be equally attracted to cement. And though conclusions either way are speculative at this point, it would appear that other cement companies or ready-mix concrete companies would be at least as likely as Cargill to enter the relevant markets, particularly since present regional producers can ordinarily extend their sales range simply by installing distribution terminals in new marketing areas, see fn. 10, *supra*. This point also deserves further exploration on remand.

business are controlled by economic giants already. Cement companies owned by U. S. Steel, the Swiss Holderbank group, Martin-Marietta and National Gypsum Corp. do not seem likely to cower before Cargill.[31] MP and smaller competitors have survived among these giant conglomerates in the past; it seems unlikely that MP will pose an insuperable new obstacle simply because of its acquisition by a wealthy stranger. Beyond this, the "entrenchment" theory seems to require more than simply a showing that the acquiring firm has a deep pocket.[32] The

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[31] Professor Turner noted that the "deep pocket" theory loses force where there are rivals large enough to counterbalance the acquiring firm's size, which is certainly the case here, see Turner, *supra* note 1, at 1360. As pointed out in Note, 86 Harv. L. Rev. 772, 783 (1973), where small potential entrants would be intimidated by a large present market occupant, the addition of another large figure in the market would have little incremental effect. MP makes the further argument that the present occupants of the field, though large, are not as cash-rich as Cargill, and that it is Cargill's liquidity that would impress and discourage potential entrants. This theory, however, has too much speculation in it to provide a sound basis for decision at this point.

[32] There is no *per se* proscription against large size in an acquiring firm, see *Reynolds Metal Co.* v. *FTC*, 309 F.2d 223, 230 (D.C. Cir. 1962) (Burger, *J.*); *Smith-Victor Corp.* v. *Sylvania Elec. Prods. Inc.*, 242 F. Supp. 315, 319-20 (N.D. Ill. 1965), although in FTC cases the courts have been quite generous in accepting Commission findings that in particular circumstances the purchaser's "deep pocket" has an anti-competitive effect, see *e.g.*, *Ecko Products Co.* v. *FTC*, 347 F.2d 745 (7 Cir. 1965) (acquiring firm's financial resources used to maintain merged firm's monopoly position in its market); *General Foods Corp.* v. *FTC*, 386 F.2d 936 (3 Cir. 1967), *cert. denied*, 391 U.S. 919 (1968) (product-extension merger in which General Foods' power in the household market would endanger the balanced duopoly in the steel wool soap pad market); *United States Steel Corp.* v. *FTC*, 426 F.2d 592 (6 Cir. 1970) (vertical integration; U.S. Steel's connections in related industries and its financial power raised entry barriers); *Kennecott Copper Co.* v. *FTC*, *supra* (approving

potential for entrenchment that troubled the Court in *Procter & Gamble* was not primarily a function of Procter's relative size, although the disparity between Procter and all of Clorox's competitors was enormous. The real danger of entrenchment came from the kinds of competitive advantages that affiliation with Procter could provide for Clorox, already the dominant firm in the liquid bleach market. As we have noted, Cargill would bring nothing to the cement industry comparable to Procter's huge advertising and merchandising programs, which could readily include bleaches as well as detergents.

In view of the weakness of the "entrenchment" claim, the lack of proof that Cargill exerted any "edge effect" on present competitive conditions, and the slim likelihood that Cargill would enter the markets here in question *de novo* or by toe-hold acquisition, we conclude that the plaintiff here was a long way from demonstrating the

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Commission finding that Kennecott would use "deep pocket" to acquire vast coal reserves and thus compete for long-term utility supply contracts). On the other hand, in *Stanley Works* v. *FTC*, 469 F.2d 498, 520 (2 Cir. 1972), *cert. denied*, 412 U.S. 928 (1973), Judge Mansfield, with the apparent support of the majority on this point, see *id.* at 501-02, n.8, observed that even though Stanley's assets were more than three times as great as the largest cabinet hardware sales company in the country, the FTC had failed to prove *how* the merger had raised barriers to entry. The Commission had not shown that the merger had in any way affected initial start-up costs, that it had increased the need for product differentiation, or that it had increased the need for sales promotion and advertising. In that case, as in this one, mere recitation of the "deep pocket" shibboleth was not enough.

probability of success ordinarily required to warrant preliminary injunctive relief.[33]

IV.

MP suggests that even if the foregoing analysis is sound, the district judge nevertheless acted properly in issuing the injunction under the second branch of the rule of this court recently recited in *Sonesta International Hotels Corp.* v. *Wellington Associates*, 483 F.2d 247, 250 (2 Cir. 1973):

> The settled rule is that a preliminary injunction should issue only upon a clear showing of either (1) probable success on the merits *and* possible irreparable injury, *or* (2) sufficiently serious questions going to the merits to make them a fair ground for litigation *and* a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

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[33] Both parties have called our attention to a 1966 report on the cement industry by the staff of the FTC, entitled Economics Report on Mergers & Vertical Integration in the Cement Industry. While the report views the decreasing number of companies in the industry with some alarm, the fears are directed at acquisitions by companies already in the industry or in a downward vertical relationship. This seems to favor Cargill's contention that such companies rather than outsiders are viewed by the industry as the most likely potential entrants, see fn. 30, *supra*. MP answers by insisting that because the FTC has opposed mergers between ready-mix concrete companies and cement producers, ready-mix companies cannot be considered potential entrants. But whatever the objections to vertical mergers between concrete and cement firms, there would plainly be no valid antitrust objection to a ready-mix concrete company entering the cement market *de novo*, see *Ford Motor Co.* v. *United States*, *supra*, 405 U.S. at 567-68 (1972), quoting from the district court's opinion, 286 F. Supp. 407, 441 (E.D. Mich. 1968), if this was feasible.

It is worth noting at the outset that, despite the references to plaintiffs in private antitrust suits as "private Attorney Generals" [34] that have now become commonplace, MP is entitled to injunctive relief only "against threatened loss or damage by violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity under the rules governing such proceedings," 15 U.S.C. § 26.

Here again the uninitiated would find it somewhat difficult to discern what "loss or damage" Cargill's tender offer could inflict on MP as a corporation, as distinguished from its management. A cornerstone of MP's antitrust argument is that acquisition of control by Cargill would make MP not too weak but too strong. It insists that the right way for Cargill to compete in the cement business in MP's territory is by direct entry or toe-hold acquisition, either of which presumably would take business away from MP rather than bring more to it. Examination of the decisions of this court in private antitrust suits developing and applying the second branch of the rule stated in *Sonesta* reveals how much weaker MP's case is than any in which that rule has previously been applied.

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[34] As is well known, the phrase was originated by Judge Frank in *Associated Industries* v. *Ickes*, 134 F.2d 694, 704 (2 Cir.), *vacated as moot*, 320 U.S. 707 (1943), with respect to attacks on government action, specifically the construction of the phrase "person aggrieved" in § 6(b) of the Bituminous Coal Act of 1937. Today the standing of the Associated Industries over which Judge Frank had to labor so hard would not require much discussion or the development of a new metaphor. Compare *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970).

The *fons et origo* of the second branch of the rule, at least in this circuit, is Judge Frank's opinion in *Hamilton Watch Co.* v. *Benrus Watch Co.*, 206 F.2d 738, 740 (2 Cir. 1953). The findings of Judge Hincks in the district court, 114 F. Supp. 307 (D. Conn. 1953), in the decision there affirmed, contrast sharply with those of the district judge here. Both Hamilton and Benrus were engaged in the business of selling jeweled watches, but the watches of Hamilton—essentially the "target" company—were superior in quality. Against this background, the court found, 114 F. Supp. at 314:

> The association of Benrus' name with Hamilton as a consequence of the publicity given to Benrus' purchases of Hamilton stock has already impaired Hamilton's competitive position in the market which it serves; it has impaired the effectiveness of Hamilton's vigorous new merchandising policy because of antagonism on the part of retail jewelers to Benrus' practices and reputation with respect to the fair trade principles of the industry and its merchandising policies; at least the record contains a prima facie showing to that effect.

The court further found:

> A director on Hamilton's board elected by Benrus would be in a position to obtain confidential information of value to Benrus as a competitor, the disclosure of which would be harmful to Hamilton and would materially impair its competitive position. In participating in the management, such a director would be subject to frequent conflicts of loyalties involving decisions dependent upon the exercise of his judgment

> faculties many of which would be of such a nature that it would be impossible to demonstrate the presence or extent of the Benrus influence if that had been a factor. . . . The presence of such a director on the Hamilton board would create a situation in which Benrus would have power to discourage the vigor of competition by Hamilton and so to embarrass and impede Hamilton's management that it might well be driven to unwanted collaboration or to a merger as the least of two evils. Such a situation would constitute irreparable harm to Hamilton.

The *Hamilton-Benrus* principle was applied in *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 259 F.2d 524 (2 Cir. 1958). Here again the two companies were direct competitors; American Crystal, the "target" company, was a United States beet sugar producer, while Cuban-American produced Cuban cane sugar. Judge Dawson's findings of irreparable injury, 152 F. Supp. 387, 393 (S.D.N.Y. 1957), included the following:

> Plaintiff is taking steps to increase the amount of business which it does in certain states in the River Territory. Disclosure of any such plans and any similar future plans to any representative of a competitor would be harmful to plaintiff; and it may be assumed that such disclosure would become inevitable if defendant succeeded in getting control of plaintiff or in obtaining representation on the board of directors of the plaintiff.
>
> For over twenty years federal legislation has established a limit on the United States marketings of the domestic beet sugar industry and all other sugar suppliers in the United States. To overcome this restriction each supplier has attempted over the years to in-

crease its quota. Similarly, a conflict has arisen between the domestic beet sugar industry and those having an interest in the Cuban sugar industry since any increase in the quota of the former must come in large part from the quota of the latter. The defendant is a member of the United States-Cuban Sugar Council which, acting in close cooperation with the Cuban government and Cuban sugar mill owners, represents the Cuban sugar viewpoint. Until recent years this Council was in sharp and active conflict with the interests of the domestic beet sugar companies with respect to amendments to the Sugar Act of 1948. If plaintiff came under control of the defendant it would tend to limit the effectiveness of the plaintiff in representing the views of the American beet sugar interests.

Gulf & Western Industries, Inc. v. *Great Atlantic & Pacific Tea Co.*, 476 F.2d 687 (2 Cir. 1973), is closer to the instant case since it involved a tender offer by a conglomerate which was not a direct competitor. However, Gulf & Western's president controlled a company that was a direct competitor of A & P, 476 F.2d at 690-91, and the atmosphere of horizontal integration hung heavily over the case despite Gulf & Western's attempt to dispel it. Moreover, apart from the fact that the court found "a probability of A & P's success on the merits on its claims of securities law violations," 476 F.2d at 697, whereas the district judge here correctly found the contrary with respect to MP's securities claims, the court stressed A & P's allegations of vertical market foreclosure, with the potential exclusion of suppliers of upwards of $100 million of goods per year, 476 F.2d at 691; to the extent that Gulf

& Western would supplant these with affiliates selling at higher prices, the possibility of damage was real.[35]

The judge here did not find in so many words that the balance of hardships tipped "decidedly" toward MP—perhaps because he considered it had shown a probability of success. However, he did find "that harmful practical effects on Missouri Portland and its shareholders would result if the tender offer were allowed to proceed, whereas the termination has inconsequential effects as to Cargill."

The harmful effects found with respect to MP were as follows:

> (1) "Serious disruption to Missouri Portland's personnel would result from having Cargill as a substantial owner pending the trial."
> (2) "Long-range planning and hiring would be significantly impaired."

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[35] It is of critical importance to note that in balancing the interests of the tender offeror, the target company, the target's shareholders and the public, the *Gulf & Western* court placed heavy emphasis on its finding that the proposed acquisition was probably unlawful. Gulf & Western's right to invest on behalf of its shareholders "can only be so where a *lawful* acquisition or investment is involved," the court wrote, and in that case it found that "the probability that the 'investment' is unlawful, as shown above, is sufficiently strong to call into serious question G & W's right to proceed with the tender offer," 476 F. 2d at 698. The public interest in barring the acquisition was also held to be a direct function of the strength of the plaintiff's antitrust and securities law claims, 479 F.2d at 698-99. Since we have found against MP's probability of success on its anti-trust claim, the balance of the various interests is necessarily quite different from that struck in *Gulf & Western*. A recent note wittily entitled, *The Courts and the Williams Act: Try a Little Tenderness*, 48 N.Y.U.L. Rev. 991, 1009-10 (1973), points out this important distinction of *Gulf & Western*.

(3) "The returning of shares to the market and the unscrambling of the assets would present substantial difficulties and might well result in serious harm to Missouri Portland and its shareholders."

To these we should add a fourth, mentioned in the *Gulf & Western* case, the possibility that MP might sustain expense in defending or suffer damages from claims in actions under the antitrust laws, 476 F.2d at 698.

Most of these items are rather unimpressive as applied to this case. Apart from the fact that the two points in item (3) are internally inconsistent, difficulty in "unscrambling" the assets could readily be met by a temporary injunction against their being scrambled, *cf. FTC* v. *PepsiCo., Inc.*, 477 F. 2d 24 (2 Cir. 1973). It is highly unlikely that Cargill, if ultimately ordered to divest itself of its MP shares, would find no way to dispose of them other than to dump them on the market at great loss to itself; moreover, the risk of an uncoordinated divestiture effort might well be greater in Cargill's current minority position than it would be if Cargill acquired control. Finally, MP has already made plans for a 40% expansion, in which Cargill apparently concurs; the record contains nothing specific about what interference in planning would occur. Here again it must be emphasized that, in contrast to a case where the acquirer is a competitor of the target company, Cargill would have no interest other than the promotion of MP's welfare.

The argument about disruption of the morale of personnel, which has become standard in take-over cases, has a peculiarly hollow ring in this one. A principal motive for Cargill's desire to enter the cement industry by ac-

quiring an established company was its own lack of know-how and the difficulty of obtaining qualified people; there has been no hurling of pejorative epithets about MP's management and expression of the desire to move in another "team" such as were present with respect to A&P; see 476 F. 2d at 696-97.[36] Furthermore MP's executives had taken extraordinary precautions to protect themselves. Within a few hours after learning of Cargill's impending offer, the chairman of MP had his board approve a seven-year employment contract at $118,000 a year;[37] earlier in December the chairman had signed contracts, similar except for amount, with all the other officers. Possible liability for the expense of or damages in antitrust litigation could be guarded against by an injunction requiring Cargill to indemnify MP for any such exposure pending a determination of legality or compliance with an order of divestiture.

Just as we believe the district court exaggerated the

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[36] In taking into account the interests of A&P in preliminary blocking Gulf & Western's tender offer, this court relied on a finding in the district court that "the executives of A&P have already suffered a tremendous downgrading of morale with just the suggestion that the company was about to be taken over by G&W." 476 F.2d at 698. We think district judges should take arguments of serious harm to a corporation due to jitters in executive suites with a fair amount of salt; the demoralizing effect, if any, would generally be limited to the fairly short period that tender offers usually run. In any event, no such finding was made here, and none would have been justified from the record.

[37] The contract provided thta if the chairman should leave the company because of a change in duties, a transfer out of the St. Louis area, or a reduction of compensation, his pay would nevertheless be unaffected.

hardship to MP in allowing the tender offer to proceed, we think it minimized the hardship to Cargill in enjoining it. The court characterized this as merely "inconvenience and financial loss of what would amount to processing a new tender offer." Such a characterization might be apt if the claim were simply that Cargill had violated §§ 14(d) and (e) of the Securities Exchange Act, where needed correction could speedily be made. As was clear from the context, that was what we meant in saying "the application for a preliminary injunction is the time when relief can best be given," *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 947 (2 Cir. 1969). But the characterization is quite unrealistic when the temporary injunction will continue in force until the trial and decision of a complicated antitrust case before a busy district judge, with MP having the strongest motivation for foot-dragging. Cargill tells us that MP "has proposed a very extensive discovery procedure involving demands for literally tens of thousands of documents" and examination of a large number of Cargill witnesses, whereas MP "has not in almost four months turned over to Cargill a single sheet of paper to support the figures" concerning the four markets which were the cornerstone of the court's decision "despite numerous formal and informal requests to produce documents relating to market shares in any market" served by MP. Experience seems to demonstrate that just as the grant of a temporary injunction in a Government antitrust suit is likely to spell the doom of an agreed merger, the grant of a temporary injunction on antitrust grounds at

the behest of a target company spells the almost certain doom of a tender offer. See *Target Company Defensive Tactics Under Section 7 of the Clayton Act*, 4 Connecticut L. Rev. 352, 387-88 & n.169 (1971).[38]

So far as the private interests are concerned, we therefore do not find the balance tipping "decidedly" or, indeed, at all, in MP's favor. Judge Hincks wrote in the opinion we approved in the *Hamilton-Benrus* case that "right thinking suggests a distinction between the private harm constituting the irreparable damage which is the primary concern of Section 16, and the lessening of competition in the relevant 'line of commerce' which constiutes the public harm with which Section 7 is primarily concerned," 114 F. Supp. at 317. With respect to public harm a target company must demonstrate a probability of success which, as previously held, MP did not do here.

Endeavoring to probe the intention of the framers of the Celler-Kefauver amendment to § 7 of the Clayton Act as best we can, we do not think they meant to endow incumbent management of a target company with the power

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[38] This was the result of the temporary injunction in the *Gulf & Western* case. As against the $20 per share offered by Gulf & Western, A&P shares are now selling at approximately $13 and have sold as low as $8.75, following the abandonment of the tender offer. While these prices doubtless reflect the general decline in stock prices, they show that management's success in forcing the abandonment of a tender offer is by no means an unmixed blessing for the shareholders of the target company. See also *Allis-Chalmers Mfg. Co.* v. *White Consolidated Indus., Inc.*, 414 F.2d 506, 510-11 n.8 (3 Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970); Schneiderman, *Preliminary Relief in Clayton Act Section 7 Cases*, 42 Antitrust L.J. 587, 590, (1973); Note, 40 N.Y.U.L. Rev. 771, 772 n.7 (1965).

to block free trade in its securities unless the anti-trust violation was fairly clear or the potential damage to the corporation decisively outweighed that to the would-be acquirer.[39] Under that test the injunction was wrongly issued.

V.

Both MP and Cargill complain that the other committed violations of the Williams Act, 15 U.S.C. § 14(d), (e) and other securities laws in the course of publicizing and opposing the tender offer. Shortly after the announcement of its offer on December 19, 1973, Cargill placed advertisements in various newspapers describing the terms of the offer. Cargill promised to pay the $30 per share offer price as soon as practicable after tender but not prior to December 28, 1973. The letter of transmittal provided that Cargill was not to be required to purchase shares before the time of payment if there had occurred any of the three conditions listed in the margin.[40] Cargill announced that it in-

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[39] In probing the legislative history of the 1950 amendment, Chief Justice Warren pointed to the final Senate report and other evidence indicating that the statutory words "may be substantially to lessen competition" required a showing of a reasonable probability of an anticompetitive effect, not a mere possibility, *Brown Shoe Co.* v. *United States, supra,* 370 U.S. at 323 & n.39.

[40] The conditions, as set out in the Offer to Purchase, were as follows:

Certain Conditions of the Offer. The Purchaser shall not be required to purchase or pay for any Shares tendered if, before the time of payment therefor, in the judgment of the Purchaser's management:

(a) Missouri shall have issued or authorized the issuance of additional securities of any class or issued or authorized the issuance of other securities in respect of, in lieu of, or in substitution for the now outstanding Shares (except pursuant to a

tended to acquire control of MP and operate it as a subsidiary or, under certain conditions, to merge MP into Cargill.

MP responded with a letter of December 21 cautioning stockholders against hasty acceptance of Cargill's offer pending further word from management. In a subsequent letter dated December 26, MP advised its shareholders of a 25% stock dividend payable on January 15, 1974, to stockholders of record on January 7. The letter also announced the usual 40 cent dividend, payable on March 15, 1974, to stockholders of record on February 20, 1974.[41]

In its complaint, MP alleged that Cargill had committed seven independent securities law violations for misrepresentations and failures to disclose material information in its Offer to Purchase and the accompanying Form 13(d),

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dividend or distribution required to be remitted to the Depositary pursuant to Section 6 of this Offer), or

(b) Missouri or any of its subsidiaries shall have entered into an agreement or otherwise committed itself with respect to a merger, consolidation, acquisition of assets, disposition of assets, or other comparable event not in the ordinary course of business, or

(c) there shall have been instituted or threatened any action or proceeding before any court or administrative agency, by any governmental agency or any other person, challenging the acquisition by the Purchaser of the Shares or otherwise relating to this Offer, or otherwise materially adversely affecting Missouri or the Purchaser.

[41] The letter went on to assail Cargill for offering a tender price substantially below the true value of the MP shares, to warn that shareholders who tendered now could be locked in from December 27 to February 17 by the terms of the offer, and to extol MP's prospects for growth and high profits.

which was submitted to the SEC.[42] The district court held that Cargill committed none of the alleged violations. On this appeal, MP presses only two of its securities law claims. These are that Cargill did not adequately disclose its future plans with respect to MP, and that Cargill did not disclose the possibility that its acquisition of MP would constitute an antitrust violation. We sustain the district judge.

After describing Cargill's plan to acquire control of, or possibly to merge MP, the offer stated:

> Except as described above, the Purchaser does not have any plan or proposal to liquidate Missouri, to sell its assets or to merge it with any other person, nor does the Purchaser at this time plan or propose any changes in the business of Missouri since the Purchaser wishes to review the situation in the light of circumstances prevailing if and when it acquires control of Missouri and at this time it reserves the right to make such changes as it deems in the best interest of Missouri's business.

The regulations under § 14(d) require a tender offer to state or summarize the information required by Schedule 13D. Item 4 of Schedule 13D requires the prospective purchaser to:

> State the purpose or purposes of the purchase or pro-

[42] These were: (1) Cargill had not sufficiently disclosed its financial condition; (2) it had offered to supply financial information privately to some MP stockholders; (3) it misrepresented that it did not intend to change the business; (4) it misrepresented to MP's management that it would not make a tender offer; (5) it failed to disclose the means of financing the tender offer; (6) it failed to disclose its own belief that MP shares were worth substantially more than $30; and (7) it failed to disclose that its acquisition of MP would violate § 7 of the Clayton Act.

> posed purchase of securities of the issuer. If the purpose or one of the purposes of the purchase or proposed purchase is to acquire control of the business of the issuer, describe any plans or proposals which the purchasers may have to liquidate the issuer, to sell its assets or to merge it with any other persons, or to make any other major change in its business or corporate structure, including, if the issuer is a registered closed-end investment company, any plans or proposals to make any changes in its investment policy for which a vote would be required by section 13 of the Investment Company Act of 1940.

"Change" is hardly an apt word to require disclosure of an intention to expand the acquired company or even to expand it substantially if conditions warrant. MP makes much of a letter from the head of the Salt Group to the cement consultant retained in February 1973 requesting the consultant to include in his study the development of a 20-year plan "which would ultimately lead Cargill to become the tenth largest cement company in ten years, the fifth largest in fifteen years, and largest in twenty years." But there is no evidence that any such plan was developed, much less adopted, or that the statement in the offer was anything but the truth. Until Cargill had decided how much it should seek to expand MP's business and by what method of financing,[43] it would be impracticable to give the stockholders any meaningful information. As said in *Susque-*

[43] MP's brief seems to proceed on the assumption that Cargill would simply donate capital to MP—an assumption surely contrary to fact unless Cargill acquired all of MP's stock or merged MP with itself, in which event MP's stockholders would no longer care.

hanna Corp. v. *Pan American Sulphur Co.*, 423 F.2d 1075, 1085-86 (5 Cir. 1970):

> Though the offeror has an obligation fairly to disclose its plan in the event of a takeover, it is not required to make predictions of future behavior, however tentatively phrased, which may cause the offeree or the public investor to rely on them unjustifiably. . . . Target companies must not be provided the opportunity to use the future plans provisions as a tool for dilatory litigation.

See also *Electronic Specialty Co.* v. *International Controls Corp.*, *supra*, 409 F.2d at 948; Note, *The Courts and the Williams Act: Try a Little Tenderness*, 48 N.Y.U.L. Rev. 991, 1001-02 (1973).

Relying on *Gulf & Western Industries*, *supra*, 476 F.2d at 697, and *Elco Corp.* v. *Microdot Inc.*, 360 F.Supp. 741, 747-53 (D. Del. 1973), MP next claims the tender was false and misleading in not disclosing the possibility or, as MP would have it, the probability that Cargill's tender offer would embroil MP in an antitrust law violation. Judge Stewart distinguished the cases in a passage we quote in the margin.[44] We agree with his analysis; indeed, we go further since we think that under the circumstances

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[44] "But the circumstances in both cases supported a conclusion that the position of the companies and the market conditions were such as to make the probability of antitrust violations clearly apparent at the time of the offer, and the Offer to Purchase should have included such a statement if any conscientious attempt had been made to state basic facts material to shareholders in reaching their decisions. Here, however, it would not have been unreasonable for Cargill's management to have concluded after appropriate inquiry that no substantial antitrust obstacles stood in the way of its acquisiion. Therefore, under the circumstances before us, the possibility that the acquisition would result in antitrust violations, a possibility that exists with every merger, need not have been disclosed to Missouri Portland's shareholders."

it would have been reasonable for Cargill's management to conclude that no antitrust obstacles actually existed. Courts should tread lightly in imposing a duty of self-flagellation on officers with respect to matters that are known as well, or almost as well, to the target company;[45] some issues concerning a contested tender offer can safely be left for the latter's riposte. Of course, if the FTC should issue a complaint with respect to Cargill's acquisition of MP, as we are told its staff has recommended, a renewed tender offer should disclose that fact, with whatever reasonable comments Cargill may choose to make about it.

VI.

In its answer, dated January 2, 1974, Cargill counterclaimed for injunctive relief on the basis of eight alleged securities law violations committed by MP.[46] The district

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[45] It is also worth noting that here Cargill's offer was for all of MP's stock whereas Gulf & Western's was for only 15% of A&P's. It is hard to see the materiality of a possible antitrust violation to an MP stockholder who had tendered and been paid for all his stock.

[46] These were: (1) MP had falsely represented that tendering stockholders would be "locked in" until February 17, 1974; (2) it had falsely represented that the stock distribution had increased the value of each shareholder's investment by 25% and that the distribution was made because of the company's improved financial performance rather than to deter Cargill's tender offer; (3) it had falsely stated that the intrinsic value of each share of MP stock was $138; (4) it violated § 10(b) of the Securities Exchange Act by purchasing shares of its own stock without disclosing various facts about its financial condition and expansion plans; (5) it failed to disclose its alleged § 10(b) violations; (6) it violated § 14(e) of the Exchange Act by stating that the $30 offer price was too low, yet not disclosing that it had instructed that its own purchases not be made at a price above $30 per share; (7) it recommended rejection of the tender offer before filing a Schedule 14D form; (8) it breached a fiduciary duty to its stockholders by authorizing the stock dividend solely to preserve control by incumbent management.

court rejected all but one of Cargill's claims, which is discussed in part VII, *infra*. Cargill here contends that the court erred in dismissing four of its claims of misrepresentations and omissions in MP's communications to stockholders.

One of the omissions that Cargill protests is MP's failure to advise its stockholders about the employment contract with its chairman discussed above. While such a disclosure might have led some MP stockholders to question the selfless devotion to the stockholders' interest professed by management,[47] we cannot believe it was sufficiently material to affect the tender decision. The other omission concerned MP's actions in purchasing its own securities. Although MP repeatedly told stockholders that its stock was worth more than the $30 per share which Cargill had offered, it had made this an upper limit on authorizing Smith Barney & Co. to purchase stock on the market to satisfy MP's obligations under management stock option plans. The judge properly rejected this claim. MP's price ceiling was in no way inconsistent with its insistence that the company's stock was worth substantially more than $30 per share. To the contrary, corporations purchase stock in the market (rather than issue new stock) for use in meeting stock option plans only when they regard the price as depressed.

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[47] We do not draw the favorable inference urged by MP from the fact that similar contracts had already been executed with its other officers. All these were executed after Cargill's initial approach to MP, although prior to its announcement that it would make a tender offer.

Cargill complained also that MP was guilty of misrepresentation when it cautioned shareholders that if they sold their shares or tendered them to Cargill during the term of the offer, they would lose the 25% stock distribution to shareholders of record on February 7, 1974. It argues that the value of the distribution lay in the declaration of the usual 40¢ dividemd on the increased number of shares which, as a practical matter, was no different than a 25% increase in the dividend, and that the effect of this action would be reflected in appreciation of the market price, which indeed occurred after the announcement. However, MP's statement was literally true and here again we are not disposed to require parties to a tender fight to conform to standards of sterilization that might be appropriate in other contexts. See *Electronic Specialty Co.* v. *International Controls Corp., supra*, 409 F.2d at 948.

A further complaint concerns a warning by MP that tendering stockholders might be "locked in" until February 17. MP's statement was based on three provisions of the offer. One was that

> Shares tendered may be withdrawn until 5:00 P.M. New York Time, on December 27, 1973, and unless theretofore purchased by the Purchaser, may also be withdrawn after February 17, 1974. Except as stated in this Section, tenders are irrevocable.

A second is paragraph 7 quoted in footnote 40 above. Cargill claims that these two provisions, which literally support MP's warning, were overridden by two sentences in paragraph 3 of the Offer to Purchase. One reads:

> Payment for all Shares duly tendered and purchased pursuant to this Offer for which certificates have been deposited with the Depository will be made by the Depository as promptly as practicable but not prior to December 28, 1973.

The other reads:

> If any tendered shares are not purchased (see Sections 7 and 11 below), certificates for such Shares will be returned without expense to the tendering stockholder as promptly as practicable.

Cargill adds that in fact it paid for all tendered stock despite the occurrence of two of the conditions listed in Section 7. While Cargill may well be right in its reading that Section 7 simply gave it an option not to purchase but did not relieve it of the duty of prompt return, the wording was sufficiently confusing that we cannot fault the district court for refusing to find MP guilty of a violation; here again, some weight should be given to the ease with which the opposing party could have set the matter straight. On a new offer, of course, Cargill can make all this entirely plain.

VII.

The most serious battle over the alleged Williams Act violations concerns the one charge the district court did sustain. In a January 2 letter to stockholders and a January 3 advertisement in the Wall Street Journal, MP said:

> This is Cargill's first bid. Cargill has indicated that it would like to acquire all of Missouri Portland's outstanding Common Stock. If Cargill does not get all of

> the Missouri Portland stock it seeks, you should ask yourself whether Cargill is likely to buy additional shares at a price higher than $30 per share—either in the open market or by raising its tender price. Cargill has reserved the right to do just this in its tender offer.

The court found this misleading since the offer provided and § 14(d)(7) required that the benefit of any improvement during the course of the offer should extend to tenderers whose stock had already been purchased. Because of this the district judge ordered that, in the event this court permitted renewal of Cargill's offer, MP should submit all defense material to him for advance approval. MP says that its reference was to a higher price in a new offer and that in any event the remedy is too severe.

The warning is certainly capable of the construction that an increase in price during the offer, or more likely, an extension since the offer was about to expire, would not inure to the benefit of those who had already tendered. As such it would be seriously misleading. How far the structures of § 14(d)(7) can be avoided by allowing an offer to expire and then making a better one is an issue as yet undecided. See Aranow & Einhorn, Tender Offers for Corporate Control 135-37 (1973).[48] The court was thus fully warranted in finding a violation here. But we agree with MP that the remedy was too severe. An injunction against such a warning without apprising stockholders of the terms

[48] Probably much will depend upon the circumstances. If the first offer was a failure and the time gap short, a court would be likely to hold that the statute applied; *per contra* if the time gap was substantial and there had been a general increase in stock prices.

of the offer and the requirements of the statute concerning an improvement in price during the offer should suffice.

We therefore reverse the grant of a temporary injunction on the basis of the antitrust claims and remand for the framing of a temporary injunction which will allow a resumption of the offer pending final determination of the antitrust issues under terms and conditions consistent with Part III of this opinion. We reverse the injunction against MP on the basis of the warning as to an increase in price for reformulation of the conditions in accordance with Part VII of this opinion. We affirm the court's other dispositions of claims under the Securities Exchange Act. Cargill may recover three-quarters of its costs.

APPENDIX B

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 5464

MISSOURI PORTLAND CEMENT COMPANY,

Plaintiff,

—against—

CARGILL, INCORPORATED and
THE FIRST BOSTON CORPORATION,

Defendants.

Appearances:

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Appendix B—Opinion of the District Court

OPINION

STEWART, *District Judge:*

Background.

Federal courts have become a common arena in which tender offer battles are waged. The action before this Court began with an order to show cause why Cargill, Incorporated (Cargill) should not be restrained from continuing its cash tender offer to purchase all outstanding shares of Missouri Portland Cement Company (Missouri Portland). The action and counter-action arise under Sections 9, 10(b), 13, 14(d) and 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78i, 78j(b), 78m, 78n(d) and 78n(e), and under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and Sections 4, 7 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 18 and 26. This Court has jurisdiction over the action under 15 U.S.C. §§ 26, 78aa.

Plaintiff Missouri Portland is a corporation organized under the laws of the State of Delaware with its principal place of business in St. Louis, Missouri. Defendant Cargill is a closely held corporation organized under the laws of the State of Delaware with its principal place of business in Minneapolis, Minnesota.

After a hearing on an application by Missouri Portland for a temporary restraining order on Friday, December 28, 1973, this Court denied Missouri Portland's application on the same day and also granted an order for expeditious discovery. The following Wednesday, January 2, 1974, hearings began on Missouri Portland's application for a preliminary injunction against Cargill's tender offer to which was joined Cargill's claim that Missouri Portland had violated the Securities Exchange Act of 1934 and for

appropriate relief. Missouri Portland's first claim is that Cargill violated the securities laws by misrepresenting and omitting material facts in its tender offer statements. The second claim against Cargill is based on the allegation that Cargill's take over of Missouri Portland would constitute a violation of the antitrust laws. While the hearings for a preliminary injunction were proceeding, Cargill applied to the Court for an order requiring Missouri Portland to stop communicating with its shareholders, to correct misrepresentations, and to turn over its shareholder list to Cargill. The orders of January 7 and 14, 1974, granted Missouri Portland's application for a preliminary injunction on the basis of the antitrust allegations and generally preserved the status quo pending appeal.[1]

The first part of this opinion is limited to a determination of the antitrust allegations.

I ANTITRUST ALLEGATIONS

FACTS. *The Portland Cement Industry*

Missouri Portland's principal business is the production of portland cement, a binding agent used in a mixture to produce concrete. The manufacturing of this dark gray fungible powder is only the first and relatively inexpensive stage in the cement business. While the manufacturing process for portland cement is well known and quite simple,

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[1] This Court ordered Cargill to refrain from any action taken for the purpose of acquiring stock in Missouri Portland. We restrained Missouri Portland from making any material changes in its business and required both parties to serve proposed drafts of advertisements and communications on each other and required that all parties must consent to the drafts or apply for leave of this Court.

the capital outlays to enter the industry are substantial, e.g., the cost of constructing a cement plant. A company planning to enter the cement business would have to have substantial resources and staying power.

The heavy bulk commodity is generally sold to ready mix concrete dealers and in some cases directly to building contractors. The cost of transporting the cement is the major expense involved in the production and distribution of the product. Ready mix dealers do not have storage facilities for cement so their needs require prompt delivery on short notice. The portland cement industry is thus characterized by substantial capital investment for the construction of plants and by the need for prompt transportation of the cement to ready mix dealers in the surrounding areas. This Court notes that Cargill's general pricing policy conforms to the structure of the cement business: to cut costs, operate on a very low margin and rely on high volume to earn profits.

Missouri Portland

Missouri Portland has three plants from which it distributes cement. They are located in St. Louis, Missouri, on the Mississippi River; Independence (Kansas City), Missouri, on the Missouri River; and Joppa, Illinois, on the Ohio River. Its plants are located on rivers so that the cement may be barged in bulk to its eight terminals located in Memphis, Tenn., Decatur, Ala., Nashville, Tenn., Owensboro, Ky., Louisville, Ky., Omaha, Neb., Peoria, Ill. and Chicago, Ill. Most of Missouri Portland's cement is transported by truck from these plants and terminals. Because of a zone pricing system used in the trucking business

cement is generally not transported over 200 miles from the plant or terminal. As a result, ready mix dealers rarely order cement from suppliers who do not have terminals or plants nearby. Although Missouri Portland operates in 11 Midwestern states it has demonstrated that its principal marketing areas are generally located within a radius of 200 miles of its plants or terminals. The underlying business factors (cost and promptness of transportation) support the contention that Missouri Portland's prime market areas are centralized around its plants and terminals. Defendant urges us to find that Missouri Portland services 11 states. We so find, but we also find that the testimony and record before this Court reflect that the serviced areas with which we are concerned are tightly concentrated around Missouri's plants and terminals. To find otherwise would be to ignore economic realities. Based upon these business realities this Court finds that the metropolitan areas which Missouri Portland services are the relevant market areas for a determination of the antitrust issues.

Portland Cement Market.

While defendant urges this Court to address itself to the general 11 state area and to the capacity of the companies in those states, we find that Missouri Portland's markets and submarkets in which competition will be adversely affected are, more particularly, metropolitan areas. Production capacities, while they are interesting, do not alone reflect actual market conditions, nor can they be used to infer the relative market positions of portland cement producers in specific metropolitan areas.

The metropolitan centers in the eleven Midwestern states served by Missouri Portland have different definable characteristics which make them distinguishable submarkets. Prices may differ from one market to another depending on the competitors present. Different markets are served by different companies. Missouri Portland has one set of competitors in Kansas City, another set in St. Louis, another in Memphis, and so on.

The seven major metropolitan marketing areas served by Missouri Portland are highly concentrated markets. Missouri Portland ranks first and accounts for 28% of the cement shipments in the St. Louis, Missouri marketing area. Ninety percent of the cement shipments are accounted for by the top four companies. In the Kansas City area Missouri Portland ranks first and accounts for 30% of the cement shipment. In this market area the top four companies account for 89% of the market. Missouri Portland ranks first in the Memphis, Tennessee metropolitan area with 30% of the market. The top three companies in this area account for approximately 100% of the cement shipments. In the Omaha, Nebraska area the top four companies account for 98% of the cement shipments. Missouri Portland accounts for 21% and ranks second in this area. Each of these metropolitan areas is a relevant market for determining whether there will be a substantial lessening of competition by a takeover of Missouri Portland by Cargill.

There is nothing in the record to reflect that the dominance of Missouri Portland in the relevant metropolitan cement markets is diminished by the existence of theoretically stronger companies in the same areas which have chosen not to produce at full capacity or not to expand

their cement divisions with their extensive capital resources.

The cement industry is aptly described as capital intensive, a factor affecting market conditions. There is a trend toward larger production facilities increasing the already substantial amount of capital necessary to build production plants. This is reflected by the fact that since 1950 entry into the industry has tended to be by large companies, either foreign cement companies or large diversified American companies. The increase in capacity has been principally made by large cement producers or by cement companies owned by large well-financed companies. The lack of capital has caused smaller plants to close down. This trend has continued to make the cement industry more highly concentrated. Difficulty of entry into this capital intensive industry is demonstrated by the estimation that it would cost $200 million to reproduce Missouri Portland's present cement facilities.

Cargill's Position

A. Cargill is a huge privately held company with substantial diversification in bulk commodity markets. Cargill had net sales of $5.3 billion and a net income of $107.8 million for fiscal year ending May 31, 1973. Its net worth as of May 31, 1973 was $352.4 million. Cargill's continuing growth is reflected by the fact that on Novemer 30, 1973 its sales were ahead of a comparable period for the prior fiscal year by $1.6 billion.

Cargill has been principally engaged in grain trading since 1865. Cargill's chief executive officer has aptly described the grain business as a commodities type business.

It involves the sale of goods and shipment in bulk. Since 1932 Cargill, through a subsidiary, has engaged in the operation of river barges which carry bulk commodity products and of tow boats which push the barges. By owning its own barges and tow boats Cargill has a competitive advantage in the transportation of grain and other commodity products because its service can be more prompt and less expensive than if it had to rely on transportation facilities of another company. By having its own barges Cargill can carry bulk commodities to a customer and then return with another commodity. Cargill's capacity for transporting bulk commodities makes diversification into commodity businesses other than grain both economically feasible and advantageous. In fact, since 1940 Cargill's expansion has been directed towards businesses involving bulk commodities. Transportation is one of the principal economic factors in any bulk commodities business, and as discussed above, this fact is especially true of portland cement.

Since 1940 Cargill has been engaged in the vegetable oil processing (soybeans) and animal feeds businesses. These products are fungible products, like grain, which are shipped in bulk. In entering these businesses Cargill began by acquiring small plants and then greatly expanding the business. Cargill's chief executive since 1960, Mr. Kelm, asserts that Cargill always endeavors to become a significant factor in any business it enters. Approximately eighty percent of Cargill's business in 1960 was in grain trading and vegetable oil processing. Cargill has developed considerable expertise in the production, marketing and distribution of bulk commodities. The commodities business requires skill in negotiation of price with sophisticated in-

dustrial users, an ability to control and limit excessive transportation costs and an ability to provide service that is expected by usual industrial customers. These skills are substantially transferable from one commodity to another. In this area Cargill has salesmen who know how to sell fungible products and have been transferred by Cargill from the sale of one bulk commodity to another. Cargill has also developed the ability to transport heavy bulk products profitably, promptly and reliably. Because Cargill is a large shipper it is given preferential treatment by railroads and other shippers. Railroads and other shippers respond quickly to service requests by Cargill. Being an immense company with prompt access to transportation services of its own as well as of others places Cargill in an ideal position to exploit these abilities by expanding its business into different bulk products.

Since 1960 Cargill's diversification has accelerated for two significant reasons: (1) Cargill wanted opportunities to reinvest its capital at a return that was greater than in grain and soybean, and (2) diversification promised to provide more stable earnings because the grain business was "dramatically cyclical." Cargill's diversification plans begin at the department levels where determinations to go into a particular product could be based on daily business factors. A Long Range Planning Committee of the Board aids Cargill's chief executive in studying various areas of possible diversification. The record reflects that since 1960 Cargill has diversified into several bulk commodity businesses. Its entry into other businesses was accomplished by acquisition of either a small or medium sized company or plant or by *de novo* entry in a business. After entering the

area Cargill significantly expands production and sales by substantial expenditures.

Cargill has entered one bulk commodities business after another in which its skills and facilities have enabled it to become a dominant factor in the market. In the 1960s Cargill entered the sugar trading business. Because sugar is a fungible bulk commodity Cargill eased into the business by hiring a man experienced in the field who then trained employees of Cargill to run the sugar business on their own. Also, in the 1960s Cargill purchased a long established medium sized ores and metals company for $6,000,000. Again these fungible products involved many of the same business skills as used in Cargill's other businesses. Cargill's subsequent purchase of a steel distributing company expanded its ores and metals business. Cargill also entered the fertilizer business in the 1960s by establishing mixing plants in strategic country locations, building warehouses and by using its personnel from other similar bulk commodities products to run its fertilizer business.

Cargill entered *de novo* into the business of international shipping of commodities and now has ocean-going vessels built for shipping bulk commodities. This expansion cost approximately $54 million and required the difficult task of hiring expert personnel and trained seamen.

A classic example of Cargill's ability to enter related bulk commodities businesses was its entry into the flour milling and corn wet milling businesses. After acquiring a small company in each business, Cargill expanded the businesses substantially. It expanded a small corn wet milling plant at a cost of $6.8 million and then built a second plant for approximately $45 million.

The chemical division of Cargill has expanded into the manufacture of man-made resins and polyurethanes, which are shipped in bulk by train or truck. The poultry products business attracted Cargill in the early 1960s and it acquired small plants in Arkansas, Florida and Delaware. It has since expanded these plants. Because transportation is a significant aspect of this business, Cargill's best skills and assets were employed in the poultry business also.

The salt business was also entered by Cargill in the 1960s. In its general fashion, Cargill entered the business through a rather small operation and thereafter expanded. By entering the salt business Cargill now possesses an additional business skill in mining. Entry into the portland cement business has now been termed "very logical" by Cargill.

Cargill's Decision to Enter the Portland Cement Industry.

In August of 1972 the Salt Department established a Salt Expansion and Diversification Group (Salt Group) to investigate priorities and expansion opportunities. The Salt Group met on August 4, 1972 and decided that expansion into a related industry should only be considered if the industry was similar to salt with respect to two of the department's skills in production, marketing and distribution. After researching such industries as coal, cement, lime, chlorine, kaolin, aggregates, zinc, flourspar, asphalt, potash, phosphate and caustic soda, and studying preliminary reports, at a meeting on October 24, 1972, the Salt Group rated the cement industry as the number one ac-

quisition prospect.[2] Mr. Leisz who had been researching the cement industry was assigned to expand the investigation and to gather financial information about cement companies. Cargill determined from independent research and from professional assistance from outside consultants that there was similarity between the cement industry and the milling industry. The consultant's report, An Overview of the Cement Industry, discussed the regional markets in the

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[2] On September 27, 1973 Cargill's salt division reported to the long range planning committee of the Cargill board:
"WHY DOES CEMENT LOOK PROMISING FOR THE SALT DEPARTMENT

1. Distribution, marketing and some production aspects of cement are very *similar* to salt.
2. Opposite *seasonality* of salt and cement which would balance out the Salt Department's sales throughout the year.
3. Demand is growing at a rate of 3-4% per year and it is estimated that this rate of growth will continue until at least 1980.
4. A world shortage of cement is developing which limits the amount of competition from foreign imports.
5. Recently prices have been trending upward. Industry representatives are optimistic that more realistic price increases will be allowed in the near future.
6. The industry is presently in a slump, which affords ease or entry, but a critical point of turn-around is forthcoming.

WHY DOES CEMENT LOOK PROMISING FOR CARGILL, INCORPORATED

1. The cement industry is capital intensive, which keeps the industry tied to a relatively few companies that are large and have 'staying power'.
2. It is a basic industry to the U. S. economy and its pattern can be closely monitored by watching G.N.P.
3. Cement is a basic bulk commodity which would enable Cargill to utilize its transportation expertise, both in relation to land and water.
4. Cement is an international commodity which would fit into Cargill's international operations readily."

cement industry, the concentrated and concentrating nature of the markets and the cost factors involved in constructing a new cement plant. After considering reports and studies the Salt Group met on December 26, 1972 and agreed that the cement industry was the primary prospect for diversification.

Cargill's firm determination to enter the cement business is further evidenced by steps taken in 1973 beginning in February when Cargill retained Robert Morrision, former President of Marquette Cement Company, to assist in selection of a cement company. It is significant to note that in setting forth Cargill's intentions to Mr. Morrison, Mr. Leisz (the cement man of the Salt Group) stated that Cargill desired an acquisition that "would allow Cargill to become the tenth largest cement company in ten years, the fifth largest in fifteen years and the largest in twenty years." This desire relates to the country as a whole but it is relevant to show what Cargill's anticipated market position will be regarding the pertinent market areas in the present lawsuit.[2a]

Having received reports on various companies by Mr. Morrison, on March 26, Mr. Leisz submitted his final report which amplified his previous conclusions and specified the following similarities between the salt and cement industries: both products are primarily bulk; products move either directly from production or through terminals to customers; the Interstate Commerce Commission regulates

[2a] Without any expansion Cargill would be acquiring a company (Missouri Portland) which is presently the number one company in three large metropolitan markets and number two in another.

these commodities; trucking accounts for over 80% of product deliveries to customers; the season for cement usage is opposite from that of salt; users have small inventories, so producers must provide excellent service; the market served from production or terminal point is generally within 150 miles; the quarrying of limestone is similar to mining salt; the needs and caliber of the sales force is the same; production equipment is similar for cement and salt; and there are two or more competitors calling on customers on a regular and frequent basis.

It was recommended that Cargill acquire a plant producing between 1½ and 3 million barrels per year. Missouri Portland's present capacity is about 10 million barrels per year. Cargill's management had advised the Salt Group that it could spend no more than $10 million for entry into the cement industry. Cargill thereafter decided to spend substantially more than $10 million. The Salt Group had previously recommended the acquisition of a small cement company or plant. Mr. Kelm testified that the Salt Department was in the best position to judge the proper size of an efficient cement plant.

At this point Cargill's interest in the cement industry spurred concrete approaches to cement companies. While many cement companies were studied, 23 of the 51 United States cement companies were actually contacted by letter as to whether they were interested in acquisition by Cargill. Thirty-one companies were finally contacted either in person or by letter. Executive level meetings were also held with ten companies who responded positively. Extensive discussions were held relating to the acquisition of the assets or

part of the assets of several cement companies, including Valley Cement Industries, Alpha Portland Cement Company, American Cement Company, Coplay Cement Company and the River Cement Plant. Except for American Cement Company, all of the above firms, or the specific assets sought to be acquired by Cargill, are smaller than Missouri Portland. We find that acquisition of these and other firms was feasible and seriously considered by Cargill.

On September 27, 1973 Mr. Leisz submitted to the Long Range Planning Committee a report which repeated the desirability of entry into the cement industry and recommended purchasing either Coplay or Valley Cement Company. Coplay Cement possesses approximately ⅔ of Missouri Portland's present capacity. Valley Cement possesses approximately 1/11 of the capacity of Missouri Portland. The September 27, 1973 report also stated that the Financial Department viewed Missouri Portland as the number one potential tender offer target. The list included several other companies, some smaller than Missouri Portland. The Long Range Planning Committee at this time concluded that it was disposed to invest $20 to $40 million to enter the cement industry and that Missouri Portland was its first choice.

This Court finds that there is nc evidence that Cargill would not enter the cement industry through some other company if it did not acquire Missouri Portland. In fact, the extensive research, study and pursuit of entry by Cargill into the cement business is conclusive of one thing—Cargill has amply demonstrated its intention to enter the cement industry. This intention is well known to the cement industry because of Cargill's active conduct in at-

tempting to enter the industry before actual contact was made with Missouri Portland[3] and long before initiating its tender offer. The fact that there are large cement companies outside the markets relevant in this case does not as a matter of fact make them likely entrants. Finally, based upon the evidence of Cargill's subjective interest in the cement industry as well as the abundant objective criteria which makes the cement industry perfect for Cargill's diversification plans, this Court finds that Cargill was for some time and still is the most likely potential entrant into the cement industry markets in which Missouri Portland has been found to be dominant.

BALANCING THE EQUITIES

Cargill's Interest.

Cargill will not be foreclosed from renewing its tender offer at a future time if this Court decides at the trial on the merits that there are no antitrust violations. Thus, enjoining the tender offer results in inconvenience and financial loss of what would amount to processing a new tender offer.

Missouri Portland's Interests.

On the other hand, if the tender offer were allowed to proceed, Missouri Portland would be seriously harmed; its corporate situation would be seriously prejudiced. Serious

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[3] After Cargill's initial acquisition inquiry was turned down by Missouri Portland, it reviewed other alternatives and recontacted Universal Atlas, Amcord, Dundee Cement and River Cement. After these inquiries Cargill decided to attempt to acquire Missouri Portland through a tender offer.

disruption to Missouri Portland's personnel would result from having Cargill as a substantial owner pending the trial. Long-range planning and hiring would be significantly impaired. The returning of shares to the market and the unscrambling of the assets would present substantial difficulties and might well result in serious harm to Missouri Portland and its shareholders. This Court finds that harmful practical effects on Missouri Portland and its shareholders would result if the tender offer were allowed to proceed, whereas the termination has inconsequential effects as to Cargill.

Conclusions of Law as to Antitrust Allegations.

The acquisition of Missouri Portland by Cargill raises substantial and difficult antitrust questions as to whether such action would eliminate a prime potential toehold entrant, eliminate a significant and well-known competitor on the edge of the market, and entrench or add to the existing dominance of a competitor in the relevant cement markets. Courts have found that any one of these three anticompetitive effects constitutes a violation of Section 7 of the Clayton Act. The market conditions and the size and positions of the corporations involved are crucial factors in determining what acts are likely to have the effect of substantially lessening competition.

In addressing the antitrust issues before this Court, we are concerned, as was Congress, with "probabilities not certainties."[4] Section 7 of the Clayton Act provides that:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the

[4] Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962).

> stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. 15 U.S.C. § 18.

One of the primary objectives of Congress when enacting this statute was to impede any trend towards economic concentration in its incipiency.[5] The legal analysis of the findings in this case must be consistent with the purpose of the Clayton Act and must be made in light of what other courts and the Federal Trade Commission have found to be situations tending to substantially lessen competition.

A brief analysis of the corporations and markets involved in this action is important before proceeding to discuss the likelihood of each of the above described anticompetitive effects resulting from Cargill's acquisition of Missouri Portland.

The Degree of Concentration in the Relevant Market Areas.

To consider the Midwestern states as a whole as being the relevant market area for purposes of determining anticompetitive effects of the challenged acquisition would be to ignore the purpose of the Clayton Act, and to ignore the practical economic realities of the portland cement industry. The following data shows the degree of concentra-

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[5] *See id.* at 317. "A requirement of certainty and actuality of injury to competition is incompatible with any efforts to supplement the Sherman Act by reaching incipient restraints." S. Rep. No. 1775, 81st Cong., 2d Sess. 6.

tion of the portland cement industry in four metropolitan areas and the degree of dominance of Missouri Portland in those areas:

St. Louis, Missouri Metropolitan Marketing Area	
Missouri Portland Cement	28%
River Cement	24
Alpha Cement	20
Universal Atlas Cement	18
Top 4	90%
Dundee Cement	10%
Kansas City, Missouri Metropolitan Marketing Area	
Missouri Portland Cement	30%
Lone Star Cement	25
Ash Grove Cement	22
Universal Atlas Cement	12
Top 4	89%
Monarch Cement	5%
General Portland Cement	5
Dewey Cement	2
Memphis, Tennessee Metropolitan Marketing Area	
Missouri Portland Cement	30%
Marquette Cement	27
River Cement	21
Arkansas Cement	10
Top 4	88%
Other	12%

Omaha, Nebraska Metropolitan Marketing Area	
Ash Grove Cement	62%
Missouri Portland Cement	21
Lone Star Cement	10
Ideal Cement	5
Top 4	98%
Other	2%

Section 7 of the Clayton Act rules out acquisitions "in any section of the country" which may substantially lessen competition. An acquisition which would probably result in the substantial lessening of competition in the metropolitan areas of St. Louis, Missouri; Kansas City, Missouri; Memphis, Tennessee and Omaha, Nebraska constitutes a violation of Section 7.

To determine the probability of an anticompetitive effect of an acquisition there are certain indicia which courts require to be demonstrated by the party attacking the acquisition. First there must be a relevant product line. Portland cement is the relevant product line.[6] Next, the degree of concentration in relevant market areas must be high or at least tending towards a high level of concentration. In the cement market areas, relevant in this case, concentration has been shown to be greater than that in

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[6] Portland cement has been held to be a relevant product line in Mississippi River Corp. v. F.T.C., 454 F.2d 1083, 1090 (8th Cir. 1972); United States Steel Corp. v. F.T.C., 426 F.2d 592, 596 (6th Cir. 1970).

the *Falstaff*[7], *Procter & Gamble*[8] and *Kennecott*[9] *cases.* In the recent past other courts have examined the high concentration of the cement industry in the same market areas (Kansas City and Memphis) as are before this Court and have concluded that:

> The finding by the Commission [FTC] that there is a trend toward concentration in the designated markets as well as in the industry as a whole is not contested . . . The percentages of concentration previously referred to in these markets have been held to be unduly high in previous antitrust cases.[10]

In 1966 the Federal Trade Commission expressed its deep concern with the concentrated nature of the cement industry and concluded:

> A comparison of concentration figures on a state basis with similar data for other products shows cement to be among the most highly concentrated prod-

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[7] In United States v. Falstaff Brewing Corp., 410 U.S. 526, 527-28, the four largest beer companies controlled 61% of sales and the eight largest controlled 81%.

[8] The top two companies controlled 65% of bleach sales and the top six companies controlled approximately 80% of the market in F.T.C. v. Procter & Gamble Co., 386 U.S. 568, 571 (1967).

[9] As to the coal industry the court in Kennecott Copper Corp. v. F.T.C., 467 F.2d 67, 73 (10th Cir. 1972), *cert. denied* 42 U.S.L.W. 3555 (No. 72-637, April 2, 1974), found that the top four companies controlled 29% of coal production and the top eight controlled 39%.

[10] Mississippi River Corp. v. F.T.C., 454 F.2d 1083, 1092 (8th Cir. 1972). *See also* United States Steel Corp. v. F.T.C., 426 F.2d 592 (6th Cir. 1970), in which the court made the following conclusion as to concentration:

> Any increase in concentration in industries whose concentration levels are already "great" is alarming because such increases make so much less likely the possibility of eventual deconcentration. *Id.* at 602.

> ucts. The median four-firm 'State' concentration ratio for portland cement was 83 percent. This is higher than most other regional industries.[11]

We note in passing that Cargill's own analysis of the industry reflected indicia of a concentrated industry.

The high degree of concentration in the cement industry especially in regional submarkets makes any acquisition which would cause further concentration particularly suspect.[12]

The evidence in this case, prior F.T.C. determinations and findings by other courts make it clear to this Court that there is a high degree of concentration in the portland cement industry. The evidence also shows that Missouri Portland is in a dominant position in the relevant submarket areas. We conclude that there is substantial evidence to support a conclusion that the acquisition of Missouri Portland by Cargill would be a significant element in increasing the already concentrated ratios of the leading firms in the cement industry.

We now turn our attention to the specific ways in which Cargill's acquisition in this case will violate the Clayton Act. The three possible anticompetitive effects of the challenged acquisition are discussed below:

1. Cargill's acquisition of Missouri Portland will eliminate Cargill as an additional competitor in highly concentrated regional submarkets in the portland cement industry.

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[11] Economic Report on Mergers and Vertical Integration in the Cement Industry, Staff Report to the Federal Trade Commission, April 1966, at p. 7.

[12] *See* United States v. Penn-Olin Chemical Co., 378 U.S. 158, 171-72 (1964); United States v. Aluminum Co., 377 U.S. 271 (1964); United States v. Philadelphia National Bank, 374 U.S. 321 (1963).

The loss of a most likely entrant as a *de novo* or toehold entrant in a concentrated market is likely to cause a substantial anticompetitive effect in the relevant submarkets. This conclusion has been reached by the Supreme Court on numerous occasions.[13]

It is apparent from the findings in this case that Cargill is engaged in business activity directly related to the portland cement industry and has clearly demonstrated its desire to enter the portland cement business. In *Procter & Gamble, supra,* the Supreme Court established a factual analysis test in determining the likelihood of entry into the industry by an acquiring company. The factual situation in the *Procter & Gamble* case presented many of the same factors that make the portland cement industry a natural area for diversification by Cargill.

The court stated in *Procter & Gamble:*

> Liquid bleach was a natural avenue of diversification since it is complementary to Procter's products, is sold to the same customers through the same channels, and is advertised and merchandised in the same manner. Procter had substantial advantages in advertising and sales promotion, which, as we have seen, are vital to the success of liquid bleach. . . . Proctor's management was experienced in producing and marketing goods similar to liquid bleach. Procter had considered the possibility of independently entering but decided against it because the acquisition of Clorox

[13] *See* United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973); Ford Motor Co. v. United States, 405 U.S. 562 (1972). *See also* F.T.C. v. Procter & Gamble Co., 386 U.S. 568 (1967); United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964); Kennecott Copper Corp. v. F.T.C., *supra.*

> would enable Procter to capture a more commanding share of the market. 386 U.S. at 580-81.

It is apparent from this Court's findings that Cargill is just as likely an entrant into the cement industry as Procter was into liquid bleach.

In *Falstaff* the Supreme Court reiterated its objective test as to what factors are determinative in deciding whether a corporation is a prime potential entrant. It stated:

> The specific question with respect to this phase of the case is not what Falstaff's internal company decisions were but whether, given its financial capabilities and conditions in the New England market, it would be reasonable to consider it a potential entrant into that market. 410 U.S. at 533.

Cargill, a company of huge financial capabilities, comes squarely within the purview of the Supreme Court's objective test.

This Court has found Cargill to be a prime entrant, in fact the most likely potential entrant,[14] into the highly concentrated cement industry. The crux of a conclusion that antitrust violations have occurred is that a likely entrant is entering the market by acquiring a dominant firm instead of entering *de novo* or by toehold entry.[15] The anticompeti-

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[14] *See* p. 19 *supra.*

[15] There is no distinction in principle between *de novo* and toehold entry. In United States v. Falstaff Brewing Corp., 410 U.S. 526 (1973), the court noted that "reference to *de novo* entry includes 'toehold' acquisition as well." 410 U.S. at 530 n.10. It is significant to note that the District Court in Falstaff faced evidence that management had consistently rejected *de novo* or toehold entry. *Id.* at 530. There is no such evidence in the instant case. *See also* Proctor & Gamble, *supra* at 580.

tive effect of this acquisition is the elimination of additional competition that Cargill would engender if it entered independently or by toehold acquisition.[16] Toehold or *de novo* entry by Cargill would have put it in competition with Missouri Portland. In the *Procter & Gamble* case the Supreme Court concluded under very similar circumstances that:

> The anticompetitive effects with which this product-extension merger is fraught can easily be seen: (1) the substitution of the powerful acquiring firm for the smaller, but already dominant, firm may substantially reduce the competitive structure of the industry by raising entry barriers and by dissuading the smaller firms from aggressively competing; (2) the acquisition eliminates the potential competition of the acquiring firm. 386 U.S. at 578.[17]

We conclude that the loss of Cargill as a competitor in a concentrated cement market by its acquisition of Missouri Portland is likely to substantially lessen competition or at the very least raises serious questions as to the anticompetitive effects resulting therefrom.

2. The challenged acquisition raises a serious possibility of a second anticompetitive effect resulting from the elimination of Cargill's disciplining influence on competition caused by its presence as a potential competitor on

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[16] *See* United States v. Penn-Olin Chemical Co., 378 U.S. 158 (1964).

[17] *See also* Ford Motor Co. v. United States, 405 U.S. 562 (1972) (Acquisition of Autolite, spark plug manufacturer, was anticompetitive, *inter alia*, because it precluded the competition that may have resulted from the independent entry of Ford into the spark plug business.); United States v. Penn-Olin Chemical Co., 378 U.S. 158 (1964); Kennecott Copper Co. v. F.T.C., *supra*.

the fringe of the market. When a large company like Cargill decides to enter an industry intimately related to its own, such decision exerts an influence on the competitive forces in the market place. When faced with situations similar to this action the Supreme Court has concluded:

> Suspect also is the acquisition by a company not competing in the market but so situated as to be a potential competitor and likely to exercise substantial influence on market behavior. Entry through merger by such a company, although its competitive conduct in the market may be the mirror image of that of the acquired company, may nevertheless violate § 7 because the entry eliminates a potential competitor exercising present influence on the market. Falstaff, supra, 410 U.S. at 531-32.[18]

The decision by Cargill to enter the cement industry, Cargill's vast resources and the probability of Missouri Portland's already dominant position being expanded are facts well known to the companies in the portland cement industry.

The Supreme Court commented on this situation in the *Penn-Olin* case:

> The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive

[18] The Court reversed the District Court in Falstaff for failing to have appraised the economic facts about Falstaff and the New England Market in order to determine whether Falstaff was actually "a potential competitor on the fringe of the market with likely influence on existing competition." 410 U.S. at 534.

> to competition which cannot be underestimated. 378 U.S. at 174.

The evidence before us brings this case well within the relevant factors and applied principles of the *Falstaff, Procter & Gamble, Penn-Olin* and *Ford* cases.

This Court holds that substantial and difficult antitrust questions are raised by Cargill's acquisition because the acquisition eliminates from the edge of the market a huge corporation with expressed intentions to enter the highly concentrated portland cement industry.

3. The acquisition of and subsequent grafting of Cargill's huge financial resources and competitive advantages onto Missouri Portland, already dominant in highly concentrated submarkets, will raise significant barriers to entry into those markets and will increase the dominance of Missouri Portland in the already concentrated markets. Prohibiting an acquisition which will tend to increase the concentration of a market and heighten barriers to entry into the market is at the very heart of the purpose and the explicit language of Section 7 of the Clayton Act. As the 10th Circuit stated in the *Kennecott* case:

> The trend towards high concentration is material. Moreover, the preservation of the possibility of future deconcentration is a legitimate aim, and the inhibition of that possibility, because of the acquisition, is a relevant factor in assessing illegality. [Citations omitted.] 467 F.2d at 78.

Just because there are large companies or subsidiaries of large companies in and around the market which theoretically have the resources to compete strongly or to overcome the barriers and enter the market does not necessarily mean there is healthy competition in that market. Most antitrust actions arise in an atmosphere where if the court were to look at the universe of possible competitors and entrants,

and ignore the present and actual structure of the market few mergers would ever be prohibited. The evidence before this Court shows that the portland cement industry is in short supply tending toward higher concentration with barriers to entry continually rising because of the capital intensive structure of the business. It further shows that Cargill will be acquiring and expanding a company already dominant in the relevant markets.

In the *Falstaff* and *Procter & Gamble* cases, the Supreme Court addressed itself to similar situations. It stated in *Falstaff* that Section 7:

> . . . bars certain acquisitions of a market competitor by a noncompetitor, such as a merger by an entrant who threatens to dominate the market or otherwise upset market conditions to the detriment of competition. F.T.C. v. Procter & Gamble Co., 386 U.S. 568, 578-580 (1967). 410 U.S. at 531.

In *Procter & Gamble* the Court clearly stated its position against acquisitions like the one before this Court in the following pertinent language:

> [T]he substitution of the powerful acquiring firm for the smaller, but already dominant, firm may substantially reduce the competitive structure of the industry by raising entry barriers and by dissuading the smaller firms from aggressively competing. . . . 386 U.S. at 578.[19]

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[19] See Mississippi River Corp. v. F.T.C., 454 F.2d 1083, 1090 (8th Cir. 1972) for a similar holding in which the industry and market areas were the same as those before this Court. The court simply stated that the acquisition would substantially lessen competition because "[b]arriers to entry in a market strengthen the market power of existing firms allowing the use of oligopolistic power with relative safety from new competition. Any new barriers make a strong market position even stronger."

Cargill's acquisition of Missouri Portland raises a clear threat that competition will be substantially lessened because such acquisition will tend to increase the concentration of the market and make the barriers to entry higher than they are already.

Missouri Portland at the very least raises serious antitrust issues the resolution of which necessitates further investigation as to whether the challenged acquisition will substantially lessen competition in the above discussed metropolitan areas. As discussed in the findings, very little, if any, harm will result to Cargill if it is presently enjoined from carrying out its tender offer. Missouri Portland will suffer serious and irreparable harm caused by the disruptive effect on Company morale, the difficulties of unscrambling merged assets and the adverse effect on it for being involved in an antitrust violation.[20] The interest of the public also clearly favors enjoining an acquisition which may substantially lessen competition.

II Securities Law Claims

We now turn to the part of this case marked more by overzealousness than by unlawful activity. The securities claims and counterclaims, as will be reflected in the findings and conclusions below, present issues about which reasonable men could differ. But plaintiff's claims as to securities law violations do not alone raise serious enough questions to warrant the granting of a preliminary injunction. We

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[20] *See* Gulf & Western Industries, Inc. v. The Great Atlantic & Pacific Tea Company, Inc., 476 F.2d 687 (2d Cir. 1973); Elco Corp. v. Microdot Inc., 360 F. Supp. 741, 753-54 (D. Del. 1973).

also address defendants' counterclaims at this time so that the Court of Appeals will be able to rule on this issue without remand in the event that it allows the tender offer to proceed.

Cargill's Tender Offer.

Cargill announced and filed a 13D Statement and an Invitation for Tenders on December 19, 1973 as its offer to purchase all of the outstanding common stock of Missouri Portland for cash at $30.00 per share. The Offer was to expire, unless extended at the option of Cargill, on January 4, 1974. The tender offer provided that shares tendered could be withdrawn through December 27, 1973 and, unless purchased by Cargill in the interim, could also be withdrawn after February 17, 1974. The offer further provided that tendered shares would be paid for promptly, effective December 28, 1973. There is disagreement between the parties as to the effect of the conditions under which Cargill would not be required to meet its obligation to pay for shares tendered but not paid for. The conditions set out in the Offer to Purchase[21] essentially provide that in the

[21] "7. Certain Conditions of the Offer. The Purchaser shall not be required to purchase or pay for any Shares tendered if, before the time of payment therefor, in the judgment of the Purchaser's management: (a) Missouri shall have issued or authorized the issuance of . . . other securities in respect of, in lieu of, or in substitution for the now outstanding shares . . . or (b) Missouri or any of its subsidiaries shall have entered into an agreement or otherwise committed itself with respect to a merger, consolidation, acquisition of assets, disposition of assets, or other comparable event not in the ordinary course of business, or (c) there shall have been instituted or threatened any action or proceedings before any court or administrative agency, by any government agency or any other person, challenging the acquisition by the Purchaser of the Shares or otherwise relating to this Offer, or otherwise materially adversely affecting Missouri or the Purchaser."

event Missouri Portland issued additional security, initiated legal action or entered into an agreement of merger or to sell its assets, then as provided by paragraph 3, certificate of tendered shares not purchased "will be returned without expense to the tendering stockholder as promptly as practicable."

The offer originally included only financial information relating to fiscal year 1973.[22] The Offer also required Cargill to give upon request of Missouri Portland shareholders more detailed financial information. Then on December 31, 1973 Cargill filed additional financial information covering fiscal year 1972.[23]

Cargill's Offer to Purchase included a statement as to what business plans it had in mind for Missouri Portland. Such statement put Missouri Portland's shareholders on notice of the possibility that Cargill might make business changes according to what it deemed was in the best interest

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[22] "For the fiscal year ended May 31, 1973 the Purchaser had net sales of $5,270.4 million and net income of $107.8 million. At May 31, 1973, the Purchaser had gross assets of $1,112.9 million, net current assets of $251.3 million and net worth of $352.4 million."

[23] "For the fiscal years ended May 31, 1973 and May 31, 1972 the Purchaser had sales of merchandise, products and services of $5,336.9 million and $3,476.7 million, respectively, and net income of $107.8 million, and $40.2 million respectively. At May 31, 1973 the Purchaser had assets of $1,103.9 million, net current assets of $251.3 million and net worth of $352.4 million, as compared to May 31, 1972 at which date the Purchaser had assets of $791.0 million, net current assets of $117.4 million, and net worth of $246.3 million."

of Missouri Portland.[24] Lastly, Cargill made no mention of possible antitrust violations arising out of the proposed acquisition.

Actions Taken by Parties Since Announcement of Tender Offer.

A special meeting of the Missouri Portland board was convened on December 18, 1973 at which time a resolution was passed authorizing management to take action to resist the tender offer. At this meeting the Chairman, Mr. Alexander, was given a seven-year employment contract. The contract, his first, requires that Missouri Portland pay Mr. Alexander $118,000/year for a seven-year term. The contract further provided that severance pay would be given to Mr. Alexander if Missouri Portland should terminate his employment without just cause or if he should terminate for good reason.[25]

Missouri Portland filed the present action on December 21, 1973. Then, on December 24, 1973 at a special meet-

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[24] The Offer to Purchase stated:

"Except as described above, the Purchaser does not have any plan or proposal to liquidate Missouri, to sell its assets or to merge it with any other person, nor does the Purchaser at this time plan or propose any changes in the business of Missouri since the Purchaser wishes to review the situation in the light of circumstances prevailing if and when it acquires control of Missouri and at this time it reserves the right to make such changes as it deems in the best interest of Missouri's business."

[25] Just cause was defined as willful failure to perform such duties as may be assigned, gross misconduct, engaging in competitive conduct or incapacitation by reason of health for 12 consecutive months. Good reason would exist if Mr. Alexander was assigned to duties other than those customarily performed, was transferred from the St. Louis area, or if he received a reduction in compensation. [Exhibit I in Evidence ¶6].

ing of the Missouri Portland board the board declared a 25 percent stock dividend and also declared the customary quarterly dividend rate of 40 cents per share. The cash dividend was to be paid on all outstanding shares thus increasing the dividend amount paid to those shareholders participating in the 25 percent stock distribution.[26] The motivation for this stock distribution has been seriously challenged by Cargill. It contends that "the primary purpose of the stock distribution was to defeat the Cargill tender offer." On the other hand, retained earnings of Missouri Portland had grown to $5 million and an increase in shares was well within the authorized limit. Although it seems likely that the timing of the dividend was strongly influenced by the tender offer, the stock distribution resulting in a dividend increase was justified as a proper business decision based on Missouri Portland's financial position.

Communications by Missouri Portland to its Shareholders.

Cargill attacks Missouri Portland's communications to its shareholders contending that the statements were misleading and omitted material facts. The communications

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[26] Missouri Portland's advertisement in *The Wall Street Journal* of December 28, 1973 stated:

1. On December 24, 1973 your Board of Directors voted a 25% stock distribution on all shares of Missouri Portland common stock outstanding. This distribution—which means you will receive one additional share of Missouri Portland common stock for each four shares you now own—will be payable on January 18, 1974 only to stockholders of record at the close of business on January 7, 1974. (Three days after Cargill's offer will expire.)

You are cautioned that if you sell your shares or tender them to Cargill you will not be entitled to receive the stock distribution.

failed to disclose that Missouri Portland had authorized Smith, Barney & Co. to purchase 100,000 of its own shares throughout 1973 at not more than $30 per share.[27] This purchase plan which resulted in the purchase of 85,000 shares was undertaken because Missouri Portland believed that its shares were undervalued and by purchasing shares from the market and holding them as treasury shares it hoped to increase the market price per share. This business decision did not constitute a judgment that the shares were worth any certain amount.

Missouri Portland also stated in its December 28, 1973 *Wall Street Journal* advertisement that shareholders who tendered could be "locked in" without being paid for their stock and would not be able to use or sell their stock.[28]

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[27] In *The Wall Street Journal* of December 28, 1973 the advertisement states:

> We believe that there are important reasons why your investment in Missouri Portland, and ours, is worth substantially more than what Cargill is bidding. Here are additional facts which you should consider carefully before deciding whether to dispose of your investment:
>
> What is Cargill after?
>
> It stands to reason that if Cargill is willing to pay you $30 a share for your Missouri Portland stock it must see a much greater value in your Company. The $30 bid is below book value. Estimated book value at September 30, 1973, unaudited, was $31.52 per share. In management's opinion, the cost of duplicating our assets today would be more than $200,000,000 or $138. per share.

[28] See n. 21 *supra* for the terms of Cargill's Tender to Purchase. The advertisement read:

> . . . If you tender now you could be 'locked in' from December 27, 1973 until February 17, 1974 and not be able to withdraw your stock should you wish to do so. While locked in, you would not be able to sell your stock elsewhere if you suddenly needed cash or if a more favorable offer were made. Nor would you be able to borrow on your stock.

This Court finds that this statement as to the possibility of being "locked in" is accurate, although the likelihood of being "locked in" was tenuous. Two of the conditions,[29] issuance of additional securities and the initiation of court action, which would allow Cargill not to pay for shares tendered, had occurred. The offer states that the shares would be returned as promptly as practicable, so the possibility of being locked in was not foreclosed.

On January 3, 1974 the following advertisement appeared in *The Wall Street Journal:*

> 1. This is Cargill's first bid. Cargill has indicated that it would like to acquire all of Missouri Portland's outstanding Common Stock. If Cargill does not get all of the Missouri Portland stock it seeks, you should ask yourself whether Cargill is likely to buy additional shares at a price higher than $30 per share—either in the open market or by raising its tender price. Cargill has reserved the right to do just this in its tender offer.

Paragraph 3 of Cargill's Offer to Tender states:

> If, prior to the expiration of this Offer, the Purchaser shall improve the terms of this Offer, such improvement shall extend to all Shares tendered and purchased prior thereto.

Also in the January 3, 1974 advertisement Missouri alerted its shareholders to the present price of its stock which was just above $30.[30]

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[29] *See* n. 21 *supra.*

[30] "Missouri Portland's recent market price has exceeded $30 per share. On December 28, 1973 Missouri Portland's stock sold on the New York Stock Exchange at a high of $30⅝ and closed at $30⅜ per share. On December 31, 1973 its stock sold at a high of $30½ and closed at $30½. *I urge you to consult your newspaper for the current market price.*"

As a final note on the subject of communication between the parties, we find that Cargill did not mention in its ad of January 2, 1974 in The Wall Street Journal[31] that Missouri Portland's stock distribution apparentiy constituted one of the three conditions in the tender offer which nullified Cargill's obligation to pay for tendered shares.

Conclusions of Law as to Securities Claims.

Sections 14(d) and (e) of the Securities Exchange Act of 1934 (the Williams Act) is the statute which governs the claims and counterclaims before this Court as to alleged securities law violations. In pertinent part the statute provides:

> § 14(e). It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. . . .

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[31] "On December 24, 1973, Missouri announced a 25% stock distribution on its outstanding shares of Common Stock payable on January 18, 1974 to stockholders of record on January 7, 1974 and also announced the payment of the quarterly dividend of $.40 per share payable March 15, 1974 to stockholders of record on February 20, 1974 which is equivalent to a 25% increase in the quarterly dividend. Neither such 25% stock distribution nor such cash dividend increase affects the Purchaser's Offer of $30 per share which expires on January 4, 1974. . . ."

The purpose behind this section is to provide investors with such disclosure as will give them adequate information with which to decide to accept or reject the tender offer.[32]

Missouri Portland Securities Claims.

Plaintiff urges this Court to conclude that Cargill's offer to purchase and its subsequent acts related thereto were false and misleading and violated Sections 14(d) and 14(e) of the Securities Exchange Act of 1934 in that (1) the offer

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[32] "It has been argued that a cash tender offer is a straightforward business proposition which can be rejected or accepted by a shareholder like any other bid for his securities. But where no information is available about the persons seeking control, or their plans, the shareholder is forced to make a decision on the basis of a market price which reflects an evaluation of the company based on the assumption that the present management and its policies will continue.

The persons seeking control, however, have information about themselves and about their plans which, if known to investors, might substantially change the assumptions on which the market price is based. This bill is designed to make the relevant facts known so that shareholders have a fair oportunity to make their decision.

* * * * *

The bill avoids tipping the balance of regulation either in favor of management or in favor of the person making the take-over bid. It is designed to require full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case.

While the bill may discourage tender offers or other attempts to acquire control by some who are unwilling to expose themselves to the light of disclosure, the committee believes this is a small price to pay for adequate investor protection. In fact, experience under the Securities Act of 1933 and the Securities Exchange Act of 1934 has amply demonstrated that the disclosure requirements of the Federal securities acts are an aid to legitimate business transactions, not a hindrance." 2 *U.S. Code Cong. & Admin. News,* 90th Cong., 2d Sess. (1968) at 2813-14.

failed to provide sufficient financial information as to Cargill; (2) it failed to define Cargill's plans to change the nature of Missouri Portland's business; (3) the possibility of antitrust violations arising out of the acquisition was not revealed by Cargill; (4) Cargill stated that Missouri Portland's stock distribution did not affect the tender offer; and (5) Cargill told Missouri Portland that it would not make an unfriendly tender offer and thus impaired the latter's ability to resist.

As to the last allegation, none of the communications between Cargill and Missouri Portland before the tender offer rise to the level of a violation of the Securities Exchange Act of 1934. These were strictly business dealings and negotiations. There is nothing in the record before us that would cause this Court to conclude that either party engaged in any impropriety prior to the anouncement of the tender offer.

As to Missouri Portland's first claim, there is no mystical number of years for which financial statements should be submitted, which will give shareholders sufficient data to make up their minds to tender or not. It has been ordered however in this circuit that under circumstances similar to those before this Court, two years of financials must be provided to shareholders of the target company.[33] Schiavone, the acquiring company, was a closed corporation which showed "a clear picture of increasing profitability" changing from a loss of $259,000 in fiscal 1972 to a profit of $233,000 in fiscal 1973 and a $618,000 profit for the first

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[33] *See* Corenco Corp. v. Schiavone & Sons, Inc. CCH Fed. Sec. L. Rep ¶ 94,220 (S.D.N.Y. 1973).

quarter of fiscal 1974. Cargill's pattern is very similar. Net income for 1972 was $40.2 million, for 1973 it was $107.8 million. Cargill filed additional information on December 31, 1973 before a large percentage of the tendering was done.

A stockholder might decide to retain his stock in the target company if the acquiring company looked like a strong investment. He might decide otherwise if the financial status of the acquiring company was gloomy. Shareholders of a target company must be provided financial data for as many years as are necessary for such stockholders reasonably to assess the offeror's business prospects. Therefore, under the circumstances, we conclude that the additional financial information provided by Cargill was adequate and was filed before the major part of the tendering occurred.

As with each of the securities law claims, what this Court requires under the Williams Act concerning financial statements should be regarded as the very minimum standard for disclosure. It is hoped that the Williams Act, as well as the other disclosure and antifraud provisions of the Securities Exchange Act of 1934, would cause corporations to act, not as close as possible to the fine line between adequate disclosure and omission, or between a questionable statement and misrepresentation, but rather to give full and clear statements to shareholders at all times.

Missouri Portland's second major allegation as to the deficiency in Cargill's Offer to Purchase is its failure to inform Missouri Portland's shareholders of its plans to make major changes in their company's business. In this respect, 17 C.F.R. § 240.13d-101 item 4 requires the tenderor to state the purpose of the proposed purchase and specify any

contemplated major change in the business or corporate structure of the target company. Cargill's statements as to its plans to make large capital expenditures to expand Missouri Portland is not such a change and does not appear to be so definitely decided as to make Cargill's statement in its Offer to Purchase misleading.

Cargill's failure to disclose the possibility of antitrust violations is claimed by Missouri Portland to be a material omission in its Offer to Purchase. The fact that this Court has issued a preliminary injunction against Cargill on the basis of the antitrust issues presented does not mean that we must automatically conclude that Cargill omitted a material fact because it did not state that there was a likelihood of anitrust violations. To hold such would be to impose a hindsight standard that whenever a court concludes that an acquisition violates the antitrust laws, the acquiring company should have included a statement as to the likelihood of antitrust violations in its tender offer statement.

The two cases upon which plaintiff relies[34] stand for the principle that when antitrust violations clearly raise obstacles to the acquisitions, failure to disclose the probable liability for such violations would be to omit a fact of "obvious concern"[35] to the target company's shareholders. But the circumstances in both cases supported a conclusion that the position of the companies and the market conditions were such as to make the probability of antitrust violations clearly apparent at the time of the offer, and the Offer to

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[34] *See* Gulf & Western Industries, Inc. v. Great Atlantic & Pacific Tea Co., Inc., 476 F.2d 687, 697 (2d Cir. 1973); Elco Corp. v. Microdot Inc., 360 F. Supp. 741, 753 (D. Del. 1973).

[35] 476 F.2d at 697.

Purchase should have included such a statement if any conscientious attempt had been made to state basic facts material to shareholders in reaching their decisions. Here, however, it would not have been unreasonable for Cargill's management to have concluded after appropriate inquiry that no substantial antitrust obstacles stood in the way of its acquisition. Therefore, under the circumstances before us, the possibility that the acquisition would result in antitrust violations, a possibility that exists with every merger, need not have been disclosed to Missouri Portland's shareholders.

Cargill's Allegations as to Securities Violations.

The conduct of Missouri Portland in opposing Cargill's tender offer raises disturbing questions as to whether Missouri Portland's conduct met the minimum standards of conduct required by the Williams Act.

The standards of conduct which the Williams Act imposes on the management of a target company are set forth in a recent case in this circuit, Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d 341 (2d Cir.), *cert. denied* 414 U.S. 910 (1973).

> In making this determination we should bear in mind that a major congressional policy behind the securities laws in general, and the antifraud provisions in particular, is the protection of investors who rely on the completeness and accuracy of information made available to them. See 1 Bromberg, Securities Law: Rule 10b-5, § 7.1 at 14 (1971). Those with greater access to information, or having a special relationship to investors making use of the information, often may have an affirmative duty of disclosure. When making

> a representation, they are required to ascertain what is material as of the time of the transaction and to disclose fully 'those material facts about which the [investor] is presumably uniformed and which would, in reasonable anticipation, affect his judgment.' *Kohler* v. *Kohler Co.*, 319 F.2d 634, 642 (7th Cir. 1963).
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> * * *
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> Corporate officers and directors in their relations with shareholders owe a high fiduciary duty of honest and fair dealing. . . . By reason of the special relationship between them shareholders are likely to rely heavily upon the representations of corporate insiders when the shareholders find themselves in the midst of a battle for control. Corporate insiders therefore have a special responsibility to be meticulous and precise in their representations to shareholders. 480 F.2d at 363-65.

Cargill complains that Missouri Portland violated the Williams Act by statements that its shareholders would be "locked in" for a period of time if they tendered their shares,[36] by its failure to disclose that it had placed a $30 per share limitation on the purchase of its own shares during the preceding year, by its stock split and communications pursuant thereto, and by the seven-year employment contract given to Mr. Alexander immediately after the tender was announced.

Based upon our findings, this Court concludes that Cargill has failed to show that Missouri Portland violated the Williams Act by acting in the above described manner. The statements by Missouri Portland, especially as to the "locked in" advertisements, the value of Missouri Portland's

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[36] *See* pp. 39-40 *supra*.

stock ($30 or more), and as to its stock split are clearly material according to the test expressed in Mills v. Electric Auto-Lite Co., 396 U.S. 375, 384 (1970). However, although the conduct complained of its material, we conclude that, upon the evidence before this Court, as discussed above, the statements and conduct of Missouri Portland's were accurate and not without basis in fact.

The final allegation by Cargill left to be considered is the claim that Missouri Portland made a material misrepresentation when it implied in its January 3, 1974 advertisement in *The Wall Street Journal* that its shareholders would not be able to take advantage of an improved offer by Cargill. The advertisement clearly implies that if Missouri Portland's shareholders tendered now they would be foreclosed from getting a higher price for their stock in case Cargill made a new offer. Not only does Cargill's offer itself commit Cargill to paying additional consideration to shares already tendered in case a subsequent improvement in the offer were made, but also § 14(d)(7) of the Williams Act requires that any increase in the price of the offer be given to shareholders who had tendered prior to the improved offer.

The advertisement contains a material misrepresentation and clearly violates the Williams Act. Missouri Portland's energetic and possibly over-enthusiastic opposition to Cargill's tender offer as well as this violation of § 14(d) have convinced this Court that we should monitor Missouri Portland's communications to its shareholders in the event that the tender offer is allowed to proceed after the contemplated review on appeal.

Conclusion.

Accordingly, it is

ORDERED that plaintiff is granted a preliminary injunction enjoining Cargill and anyone acting on its behalf from further soliciting the tender of any Missouri Portland shares; acquiring any Missouri Portland shares as a result of the tender offer; voting any shares of Missouri Portland common stock; and otherwise utilizing such stock as a means of gaining control of Missouri Portland until a full trial on the merits can be held. Plaintiff is denied a preliminary injunction as to its securities claims.

Based on this Court's conclusions as to Cargill's counterclaims it is hereby further

ORDERED, in the event that the tender offer is allowed to proceed, that Missouri Portland or anyone acting on its behalf shall not in any way, directly or indirectly, issue any public statement or any communication concerning the tender offer by Cargill without first serving on notice such statement or communication upon the other parties to this action, and unless all parties herein consent to the contents of the proposed draft, the statement shall not be communicated without approval of this Court; and it is further

ORDERED that plaintiff Missouri Portland shall give bond forthwith in the sum of One Hundred Thousand Dollars ($100,000.) which shall be held as security for the payment of such costs and damages as may be incurred or

suffered by any party who is found to be wrongfully enjoined or restrained.

So ORDERED.

CHARLES STEWART J.
United States District Judge

Dated: New York, N. Y.
April 15, 1974.